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## APPENDIX B.

# Report on Legal Analysis

### Introduction

In this section Holland & Knight LLP analyzes recent cases regarding the Federal DBE Program and local M/WBE programs to provide a summary of the legal framework for the disparity study as applicable to the Idaho Transportation Department (“ITD”). This section begins with a review of the landmark United States Supreme Court decision in City of Richmond v. J.A. Croson.<sup>1</sup> Croson sets forth the strict scrutiny constitutional analysis applicable in the legal framework for conducting a disparity study.

This section also notes the United States Supreme Court decision in Adarand Constructors, Inc. v. Peña,<sup>2</sup> (“Adarand I”), which applied the strict scrutiny analysis set forth in Croson to federal programs that provide federal assistance to state government recipients. The Supreme Court’s decision in Adarand I, provides the basis for the legal analysis in connection with ITD’s participation in the Federal DBE Program.

The legal framework then analyzes and applies significant recent court decisions that have followed, interpreted, and applied Croson and Adarand I to the present and that are applicable to the ITD disparity study and the strict scrutiny analysis. In particular, this analysis applies the recent Ninth Circuit decision in Western States Paving Co. v. Washington State DOT,<sup>3</sup> in which the Ninth Circuit held that mere compliance with the Federal DBE Program, absent independent state-specific evidence of discrimination in its market, did not satisfy the strict scrutiny analysis. The analyses of Western States Paving Co., and these other recent cases are applicable to ITD and the disparity study because they are the most recent and significant decisions by federal courts setting forth the legal framework applied to the Federal DBE Program.<sup>4</sup> They also are applicable in terms of the preparation of ITD’s DBE Program submitted in compliance with the Federal DBE Regulations.

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<sup>1</sup> 488 U.S. 469 (1989).

<sup>2</sup> 515 U.S. 200 (1995).

<sup>3</sup> 407 F.3d 983 (9th Cir. 2005).

<sup>4</sup> N. Contracting, Inc. v. Illinois DOT, 473 F.3d 715 (7th Cir. 2007); Sherbrooke Turf, Inc. v. Minn. DOT, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004); Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) (“Adarand VII”).

Following *Western States Paving*, the USDOT has recommended the use of disparity studies by state DOTs to examine whether or not there is evidence of discrimination or its effects, and how remedies might be narrowly tailored in developing their DBE Program to comply with the Federal DBE Program.<sup>5</sup> The USDOT suggests consideration of both statistical and anecdotal evidence, which should be examined separately for each group presumed to be disadvantaged in 49 CFR Part 26.

## U.S. Supreme Court Cases

**City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).** In *Croson*, the U.S. Supreme Court struck down the City of Richmond's "set-aside" program as unconstitutional because it did not satisfy the strict scrutiny analysis applied to "race based" governmental programs. J.A. Croson Co. ("Croson") challenged the City of Richmond's minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more Minority Business Enterprises ("MBE"). In enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

The Supreme Court held the City of Richmond's "set-aside" action plan violated the Equal Protection Clause of the Fourteenth Amendment. The Court applied the "strict scrutiny" standard, generally applicable to any race-based classification, which requires a governmental entity to have a "compelling governmental interest" in remedying past identified discrimination and that any program adopted by a local or state government must be "narrowly tailored" to achieve the goal of remedying the identified discrimination.

The Court determined that the plan neither served a "compelling governmental interest" nor offered a "narrowly tailored" remedy to prior discrimination. The Court found no "compelling governmental interest" because the City had not provided "a strong basis in evidence for its conclusion that [race-based] remedial action was necessary." The Court held the City presented no direct evidence of any race discrimination on its part in awarding construction contracts or any evidence that the City's prime contractors had discriminated against minority-owned subcontractors. The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

Similarly, the Court held the City failed to demonstrate that the plan was "narrowly tailored" for several reasons, including because there did not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting, and because of the over inclusiveness of certain minorities in the "preference" program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.

The Court further found "if the City could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, . . . [i]t could take affirmative steps to dismantle such a system." The Court held that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the

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<sup>5</sup> Questions and Answers Concerning Response to *Western States Paving Company v. Washington State Department of Transportation* [hereinafter DOT Guidance], available at [http://www.fhwa.dot.gov/civilrights/dbe\\_memo\\_a5.htm](http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm). See 49 CFR Section 26.9 (January 2006)

locality's prime contractors, an inference of discriminatory exclusion could arise." The Supreme Court noted that it did not intend its decision to preclude a state or local government from "taking action to rectify the effects of identified discrimination within its jurisdiction."

**Adarand Constructors, Inc. v. Peña ("Adarand I"), 515 U.S. 200 (1995).** In Adarand I, the U.S. Supreme Court extended the holding in Croson and ruled that all federal government programs that use racial or ethnic criteria as factors in procurement decisions must pass a test of strict scrutiny in order to survive constitutional muster. In the wake of Adarand I, the many affirmative action programs established by the federal government are currently undergoing review. Adarand I sets forth the predicate constitutional standard that applies to ITD's implementation of the Federal DBE Program.

## **The Legal Framework Applied to the Federal DBE Program**

The following provides an analysis for the legal framework focusing on key cases regarding the Federal DBE Program and local MBE/WBE programs, and their implications for a disparity study. Western States Paving, and other recent cases are applicable to ITD and the disparity study because they are the most recent and significant decisions involving the Federal DBE Program and states' implementation of the Program.<sup>6</sup>

### **Strict Scrutiny Analysis**

Strict scrutiny analysis. ITD's implementation of the Federal DBE Program is subject to the strict scrutiny constitutional analysis. The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and
- The program must be narrowly tailored to achieve that compelling government interest.

**Compelling Governmental Interest.** The first prong of the strict scrutiny analysis requires a governmental entity to have a "compelling governmental interest" in remedying past identified discrimination in order to enact a race-based program. The Ninth Circuit and other federal courts have held that, with respect to the Federal DBE Program, state departments of transportation do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.<sup>7</sup> The federal courts have held that Congress had ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 C.F.R. Part 26).<sup>8</sup> Specifically, the

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<sup>6</sup> N. Contracting, 473 F.3d 715; Sherbrooke Turf, 345 F.3d 964; Adarand VII, 228 F.3d 1147.

<sup>7</sup> N. Contracting, 473 F.3d at 721; Western States Paving, 407 F.3d at 991; Sherbrooke Turf, 345 F.3d at 969; Adarand VII, 228 F.3d at 1176.

<sup>8</sup> Id. In the case of Rothe Dev. Corp. v. U.S. Dept. of Defense, 413 F.3d 1327 (Fed. Cir. 2005), the Federal Circuit questioned whether the evidence of discrimination before Congress was in fact so "outdated" so as to provide an insufficient basis in evidence for the Department of Defense program (i.e. whether a compelling interest was satisfied). The Federal Circuit remanded the case to the district court to rule on this issue. Rothe considered the validity of race- and gender-conscious Department of Defense ("DOD") regulations (2006 Reauthorization of the 1207 Program). The decisions in N. Contracting, Sherbrooke Turf, Adarand VII, and Western States Paving held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in Rothe on August 10, 2007 issued its order denying Plaintiff Rothe's Motion for Summary Judgment and granting Defendant United States Department of Defense's Cross-Motion for Summary Judgment, holding the 2006

federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”<sup>9</sup> The evidence found to satisfy the compelling interest standard included numerous congressional investigations and hearings, and outside studies of statistical and anecdotal evidence (e.g. disparity studies).<sup>10</sup> The evidentiary basis on which Congress relied to support its finding of discrimination includes:

- **Barriers to Minority Business Formation.** Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide, noting the existence of “old boy” networks, from which minority firms have traditionally been excluded, and the race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.<sup>11</sup>
- **Barriers to Competition for Existing Minority Enterprises.** Congress found evidence showing systematic exclusion and discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor’s work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.<sup>12</sup>
- **Local Disparity Studies.** Congress found that local studies throughout the country tend to show a disparity between utilization and availability of minority-owned firms, raising an inference of discrimination.<sup>13</sup>
- **Results of Removing Affirmative Action Programs.** Congress found evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears, which courts have found strongly supports the government's claim that there are significant barriers to minority competition, raising the specter of discrimination.<sup>14</sup>

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Reauthorization of the 1207 DOD Program constitutional. Rothe Devel. Corp. v. U.S. Dept. of Defense, Civil Action No. SA-98-CV-1011-XR (W.D. Tex. Aug. 10, 2007). The district court found the data contained in the *Appendix*, the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in Sherbrooke Turf, Adarand VII, and Western States Paving in upholding the constitutionality of the Federal DBE Program – was “stale” as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. See the discussion of the recent district court decision in Rothe below in Section VI(1)(A).

<sup>9</sup> Sherbrooke Turf, 345 F.3d at 970, (citing Adarand VII, 228 F.3d at 1167 – 76); Western States Paving, 407 F.3d at 992-93.

<sup>10</sup> See, e.g., Adarand VII, 228 F.3d at 1167– 76; see also Western States Paving, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”).

<sup>11</sup> Adarand VII, 228 F.3d. at 1168-70; Western States Paving, 407 F.3d at 992.

<sup>12</sup> Id. at 1170-72.

<sup>13</sup> Id. at 1172-74.

<sup>14</sup> Id. at 1174-75.

**Narrow Tailoring of a State Department of Transportation's Implementation of the Federal DBE Program.** The second prong of the strict scrutiny analysis requires that a state department of transportation's implementation of the Federal DBE Program be "narrowly tailored" to remedy identified discrimination in a particular state's transportation contracting and procurement market.<sup>15</sup> The narrow tailoring requirement has several components. First, according to *Western States Paving*, a state must have independent evidence of discrimination within the state's own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race- or gender-conscious remedial action.<sup>16</sup> Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.<sup>17</sup>

Second, in *Western States Paving*, the court found that even where evidence of discrimination is present in a state, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race-conscious program, for each of the minority groups to be included in any race-conscious elements in a state's implementation of the Federal DBE Program, there must be evidence that they suffered discrimination within the local marketplace.

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, the federal courts have held the following factors are pertinent:

- Evidence of state-specific identified discrimination in the transportation contracting industry;
- Flexibility and duration of a race-conscious remedy;
- Relationship of the numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and gender-neutral remedies;
- Impact of a race-conscious remedy on third parties; and
- Application of the program to only those minority groups who have actually suffered discrimination (the over- or under-inclusiveness factor).<sup>18</sup>

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<sup>15</sup> *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71.

<sup>16</sup> *Western States Paving*, 407 F.3d at 997-98, 1002-03.

<sup>17</sup> *Id.* at 995-1003. It should be pointed out that in the recent *Northern Contracting* decision (January 8, 2007), the Seventh Circuit cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT's program." 473 F.3d at 722. The Seventh Circuit distinguished both the Ninth Circuit decision in *Western States Paving* and the Eighth Circuit decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis. The Seventh Circuit stated in a footnote that the court in *Western States Paving* "misread" the decision in *Milwaukee County Pavers*. *Id.* at 722, n.5. The Seventh Circuit held instead that IDOT's application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program. *Id.* at 722. The Seventh Circuit analyzed IDOT's compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions and its use of race-neutral methods set forth in the federal regulations. *Id.* at 723-24. The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 C.F.R. Part 26). *Id.* Accordingly, the Seventh Circuit affirmed the district court upholding the validity of IDOT's DBE program.

<sup>18</sup> See, e.g., *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181.

As discussed above, if a recipient of federal funds through the Federal DBE Program (like a state DOT) lacks sufficient evidence of discrimination or its effects, then it should conduct a study in order to comply with the requirements of the Federal DBE Program, and to determine whether there is evidence of discrimination or its effects in the transportation contracting industry.<sup>19</sup> Both statistical and anecdotal evidence are relevant in this assessment.<sup>20</sup>

**Burden of Proof.** Under the strict scrutiny analysis, and to the extent a state department of transportation has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a “strong basis in evidence” (both statistical and anecdotal evidence) to support its remedial action.<sup>21</sup> If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.<sup>22</sup> However, the challenger bears the ultimate burden of showing that the governmental entity’s evidence “did not support an inference of discrimination.”<sup>23</sup>

**Statistical Evidence.** Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e. to prove a compelling governmental interest, or in the case of the Federal DBE Program, to prove narrow tailoring of program implementation at the state or local level).<sup>24</sup>

One form of statistical evidence is the comparison of a government’s utilization of minority contractors compared to the relative availability of qualified, willing and able minority contractors. It has been held that a precipitous drop in DBE participation when no race-conscious methods are used may support a conclusion that a substantial portion of a state’s DBE goal cannot be met with race-neutral measures.<sup>25</sup>

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<sup>19</sup> DOT Guidance, *supra* note 7; 42 C.F.R. § 26.45; *Western States Paving*, 407 F.3d at 1002-03.

<sup>20</sup> *Western States Paving*, 407 F.3d at 991; *Adarand VII*, 228 F.3d at 1166.

<sup>21</sup> See *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1166.

<sup>22</sup> *Adarand VII*, 228 F.3d at 1166.

<sup>23</sup> *Id.*; see also *Sherbrooke Turf*, 345 F.3d at 971; *Eng’g Contractors Ass’n of S. Fla. Inc. v. Metro. Dade County*, 122 F.3d 895, 916 (11th Cir. 1997); *N. Contracting*, 473 F.3d at 721.

<sup>24</sup> See, e.g., *Croson*, 488 U.S. at 509; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Adarand VII*, 228 F.3d at 1166.

<sup>25</sup> *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

Other considerations regarding statistical evidence include:

- **Availability Analysis.** A disparity index requires an availability analysis. DBE, MBE, and WBE availability measures the relative number of DBEs, MBEs, and WBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.<sup>26</sup> There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered.<sup>27</sup> "An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach."<sup>28</sup>
- **Utilization Analysis.** Courts have accepted measuring utilization based on the proportion of an agency's contract dollars going to DBEs.<sup>29</sup>
- **Disparity Index.** A disparity index may be utilized to determine whether or not there is a significant statistical disparity.<sup>30</sup> A disparity index is defined as the ratio of the percentage utilization to the percentage availability times 100. A disparity index below 80 has been accepted as evidence of adverse impact. This has been referred to as "The Rule of Thumb" or "The 80% Rule."<sup>31</sup>
- **Significant Statistical Disparity.** The federal courts have held that a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors may raise an inference of discriminatory exclusion.<sup>32</sup> However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.<sup>33</sup>
- **Two Standard Deviation Test.** The standard deviation figure describes the probability that the measured disparity is the result of mere chance. A statistical disparity that corresponds to a standard deviation of less than two is not considered to be statistically significant evidence of discrimination.<sup>34</sup>

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<sup>26</sup> See, e.g., Croson, 448 U.S. at 509; 49 C.F.R. § 26.35; N. Contracting, 473 F.3d at 718, 722-23; Western States Paving, 407 F.3d at 995.

<sup>27</sup> Contractors Ass'n of Easton Pennsylvania, Inc. v. City of Philadelphia, 91 F.3d 586, 603 (3d Cir. 1996) ("CAEP II").

<sup>28</sup> Id.

<sup>29</sup> See N. Contracting, 473 F.3d at 717-720; Sherbrooke Turf, 345 F.3d at 973.

<sup>30</sup> Eng'g Contractors Ass'n, 122 F.3d at 914; W.H. Scott Constr. Co. v. City of Jackson, 199 F.3d 206, 218 (5th Cir. 1999); Contractors Ass'n of Easton Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990, 1005 (3d Cir. 1993).

<sup>31</sup> See, e.g., Eng'g Contractors Ass'n, 122 F.3d at 914, 923; Concrete Works of Colo., Inc. v. City and County of Denver, 36 F.3d 1513, 1524 (10th Cir. 1994).

<sup>32</sup> Croson, 448 U.S. at 509; Concrete Works, 321 F.3d at 970; see Western States Paving, 407 F.3d at 1001.

<sup>33</sup> Western States Paving, 407 F.3d at 1001.

<sup>34</sup> Eng'g Contractors Ass'n, 122 F.3d at 914, 917, 923; The Compelling Interest, 61 Fed. Reg. at 26047, n. 19.

**Anecdotal Evidence.** Anecdotal evidence includes personal accounts of incidents, including of discrimination, told from the witness' perspective. Anecdotal evidence of discrimination, standing alone, generally is insufficient to show a systematic pattern of discrimination.<sup>35</sup> In *Western States Paving*, the Ninth Circuit found the absence of anecdotal evidence problematic.<sup>36</sup>

Personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.<sup>37</sup> Examples of anecdotal evidence may include:

- Testimony of DBE owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which DBE owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from DBEs on non-DBE goal projects; and
- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.<sup>38</sup>

Courts have accepted and recognize that anecdotal evidence is the witness' narrative of incidents told from his or her perspective, including the witness' thoughts, feelings, and perceptions, and thus need not be verified.<sup>39</sup>

**Race and Gender-Neutral Measures.** To the extent a "strong basis in evidence" exists concerning discrimination in a state's particular transportation contracting and procurement industry, the courts analyze several criteria or factors to determine whether a state's implementation of the Federal DBE Program is narrowly tailored. One of the key factors is consideration of race- and gender-neutral measures.

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<sup>35</sup> *Eng'g Contractors Ass'n*, 122 F.3d at 924-25.

<sup>36</sup> 407 F.3d at 1001.

<sup>37</sup> See, e.g., *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520; *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

<sup>38</sup> See, e.g., *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76; *The Compelling Interest*, 61 Fed. Reg. at 26058-62.

<sup>39</sup> See, e.g., *Concrete Works*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at \*21, N. 32 (N.D. Ill. Sept. 8, 2005), aff'd 473 F.3d 715 (7th Cir. 2007).

The federal regulations<sup>40</sup> and the courts require that state departments of transportation implement or seriously consider race- and gender-neutral remedies prior to the implementation of race- and gender-conscious remedies.<sup>41</sup> The Ninth Circuit in *Western States Paving* also found “the regulations require a state to ‘meet the maximum feasible portion of [its] overall goal by using race neutral means.’”<sup>42</sup>

A state department of transportation must give “serious, good faith consideration of workable race-neutral alternatives” prior to implementing a race-conscious program. Examples of race- and gender-neutral alternatives include, but are not limited to, the following:

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state to acquaint small firms with large firms;

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<sup>40</sup> 49 C.F.R. § 26.51(a) requires state departments of transportation to “meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation.”

<sup>41</sup> See, e.g., *Adarand VII*, 228 F.3d at 1179; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972. Additionally, in September of 2005, the United States Commission on Civil Rights (the “Commission”) issued its report entitled “Federal Procurement After *Adarand*” setting forth its findings pertaining to federal agencies’ compliance with the constitutional standard enunciated in *Adarand*. United States Commission on Civil Rights: Federal Procurement After *Adarand* (Sept. 2005), available at <http://www.usccr.gov>. The Commission found that ten years after the Court’s *Adarand* decision, federal agencies have largely failed to narrowly tailor their reliance on race-conscious programs and have failed to seriously consider race-neutral measures that would effectively redress discrimination. Although some agencies employ some race-neutral strategies, the agencies fail “to engage in the basic activities that are the hallmarks of serious consideration,” including program evaluation, outcomes measurement, reliable empirical research and data collection, and periodic review. 42 407 F.3d at 993 (citing 49 C.F.R. § 26.51(a)).

- Creation and distribution of DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.<sup>43</sup>

49 C.F.R. § 26.51(b) provides examples of race- and gender-neutral measures that ITD should seriously consider and utilize. The Ninth Circuit in *Western States Paving* held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race- and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”<sup>44</sup>

### **Intermediate Scrutiny Analysis.**

The Ninth Circuit Court of Appeals and other Federal Circuit Courts of Appeal apply intermediate scrutiny to gender-conscious programs.<sup>45</sup> The Ninth Circuit has interpreted this standard to require that gender-based classifications be:

1. Supported by both an exceedingly persuasive justification; and
2. Substantially related to the achievement of that underlying objective.

This standard as interpreted by the Ninth Circuit has been characterized as falling somewhere between intermediate and strict scrutiny.

Under the traditional intermediate scrutiny standard, the court reviews a gender-conscious program by analyzing whether the state actor has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is an appropriate response to such discrimination. This standard requires the state actor to present probative evidence in support of its stated rationale for the program.<sup>46</sup>

Intermediate scrutiny, as interpreted by the Ninth Circuit and other Federal Circuit Courts of Appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective. The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, the intermediate scrutiny standard does not require any showing of government involvement, active or passive, in the discrimination it seeks to remedy.<sup>47</sup>

**Ongoing Review.** The above represents a summary of the legal framework pertinent to implementation of the Federal DBE program. Because this is a dynamic area of the law, this framework is subject to ongoing review as the law continues to evolve.

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<sup>43</sup> See 49 C.F.R. § 26.51(b); See, e.g., *Croson*, 488 U.S. at 509-510; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179.

<sup>44</sup> *Western States Paving*, 407 F.3d at 993.

<sup>45</sup> See generally, *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931; *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 908; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994).

<sup>46</sup> *Coral Constr. Co.*, 941 F.2d at 931-32.

<sup>47</sup> *Id.*

## **Recent Decisions in the Ninth Circuit Involving the Federal DBE Program and Federally-funded Projects that Impact the ITD DBE Program**

### **Western States Paving Co. v. Washington State DOT, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006)**

This case is binding on ITD's continued implementation of the Federal DBE Program. In Western States, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court very recently denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. ("Plaintiff") was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, Plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT ("WSDOT") under the Transportation Act for the 21<sup>st</sup> Century ("TEA-21"). Id.

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. Id. at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally funded projects. Id. The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. Id. TEA-21 indicates the 10% DBE utilization requirement is "aspirational," and the statutory goal "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent." Id.

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to "adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies." Id. at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. Id. (citing regulation). TEA-21 requires a generalized, "undifferentiated" minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (e.g. between Hispanics, blacks, and women). Id. at 990 (citing regulation).

"A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses." Id. (citing regulation). Race- and sex-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. Id. (citing regulation).

However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to "obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means." Id. (citing regulation).

A prime contractor must use "good faith efforts" to satisfy a contract's DBE utilization goal. Id. (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. Id. (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14% minority participation on the first project Plaintiff bid on; the prime contractor thus rejected Plaintiff's bid in favor of a higher bidding minority-owned subcontracting firm. Id. at 987. In September of 2000, Plaintiff again submitted a bid on project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. Id. The prime contractor expressly stated that he rejected Plaintiff's bid due to the minority utilization requirement. Id.

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. Id. The district court rejected both of Plaintiff's challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. Id. at 988. The district court rejected the as-applied challenge concluding that Washington's implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. Id. Plaintiff appealed to the Ninth Circuit Court of Appeals (the "Court"). Id.

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The Court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. Id. at 990-91. The Court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it "would not yield a different result." Id. at 990, n. 6.

**Facial Challenge (Federal Government).** The Court first noted that the federal government has a compelling interest in "ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Id. at 991, citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989) and Adarand Constructors, Inc. v. Slater ("Adarand VII"), 228 F.3d 1147, 1176 (10th Cir. 2000). The Court found that "[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination." Id. at 991. The Court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. Id. However, citing both the Eighth and Tenth Circuits, the Court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. Id. The Court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly

tailored and thus satisfied strict scrutiny. Id. at 992-93. The Court accordingly rejected Plaintiff's facial challenge. Id.

**As-Applied Challenge (State of Washington).** Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington's transportation contracting industry. Id. at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. Id. The United States intervened to defend TEA-21's facial constitutionality, and "unambiguously conceded that TEA-21's race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present." Id. at 996; see also Br. for the United States, at 28 (April 19, 2004) ("DOT's regulations . . . are designed to assist States in ensuring that race-conscious remedies are limited to *only* those jurisdictions where discrimination or its effects are a problem and *only* as a last resort when race-neutral relief is insufficient." (emphasis in original)).

The Court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in Sherbrooke Turf, Inc. v. Minnesota DOT, 345 F.3d 964 (8th Cir. 2003), cert. denied 124 S. Ct. 2158 (2004). Id. at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress's nationwide remedial objective. Id. However, the Eighth Circuit did consider whether the states' implementation of TEA-21 was narrowly tailored to achieve Congress's remedial objective. Id. The Eighth Circuit thus looked to the states' independent evidence of discrimination because "to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed." Id. (internal citations omitted). The Eighth Circuit relied on the states' statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. Id. at 997.

The Court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. Id. However, the Court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. Id. Rather, the Court held that whether Washington's DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington's transportation contracting industry. Id. at 997-98. "If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex." Id. at 998. The Court held that a Sixth Circuit decision to the contrary, Tennessee Asphalt Co. v. Farris, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. Id. at 997, n. 9.

The Court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. Id. at 998, citing Croson, 488 U.S. at 478. The Court also found that in Monterey Mechanical Co. v. Wilson, 125 F.3d 702, 713 (9th Cir. 1997), it had "previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination." Id. In Monterey Mechanical, the Court held that "the overly inclusive designation of benefited minority groups was a 'red flag[] signaling that the

statute is not, as the Equal Protection Clause requires, narrowly tailored.'" Id., citing Monterey Mechanical, 125 F.3d at 714. The Court found that other courts are in accord. Id. at 998-99, citing Builder's Ass'n of Greater Chi. v. County of Cook, 256 F.3d 642, 647 (7th Cir. 2001); Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 737 (6th Cir. 2000); O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the Court found that each of the principal minority groups benefited by Washington's DBE program must have suffered discrimination within the State. Id. at 999.

The Court found that Washington's program closely tracked the sample USDOT DBE program. Id. WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory, by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). Id. WSDOT then upwardly adjusted the 11.17% base figure to 14% "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." Id. Although DBE's performed 18% of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14% because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. Id. at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. Id. WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination." Id.

WSDOT then determined that it needed to achieve 5% of its 14% goal through race-conscious means based on a 9% DBE participation rate on state-funded contracts that did not include affirmative action components (i.e. 9% participation could be achieved through race-neutral means). Id. at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. Id.

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. Id. It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14% of the State's transportation contracts in 2000 but received only 9% of the subcontracting funds on contracts that did not include an affirmative actions component. Id. The Court found that the State's methodology was flawed because the 14% figure was based on the earlier 18% figure, discussed supra, which included contracts with affirmative action components. Id. The Court concluded that the 14% figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. Id. The Court also found the State conceded as much to the district court. Id.

The Court held that a disparity between DBE performance on contracts with an affirmative action component and those without "does not provide any evidence of discrimination against DBEs." Id. The Court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). Id. However, the Court determined that such evidence was entitled to "little weight" because it did not take into account a multitude of other factors such as firm size. Id.

Moreover, the Court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The Court found that WSDOT did not present any anecdotal evidence. *Id.* The Court rejected the State's argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id.* Accordingly, the Court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress's compelling remedial interest. *Id.* at 1002-03.

The Court AFFIRMED the district court's grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, REVERSED the grant of summary judgment to Washington on the as-applied challenge, and REMANDED to determine the State's liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

**Western States Paving Co. v. Washington DOT,**  
**US DOT and FHWA, 2006 WL 1734163 (W.D. Wash. June 23, 2006).**

This case was before the district court pursuant to the Ninth Circuit's remand order in Western States Paving Co. v. Washington DOT, US DOT, and FHWA, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross motions for summary judgment on Plaintiff's claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the Washington Department of Transportation ("WSDOT") voluntarily discontinued its DBE program after the Ninth Circuit decision, supra, the district court dismissed Plaintiff's claim for injunctive relief as moot. The court found "it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in Western States," and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States' claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT's unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the "State Defendants." Specifically, the WSDOT – and not the County or the City – developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification "who averred that they had been subject to 'general societal discrimination.'"

Third, the court dismissed Plaintiff's 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed Plaintiff's 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred.

The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d et seq.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that "a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . Title VI." The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT's DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff's claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar Plaintiff's §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered Plaintiff's race when calculating the annual utilization goal. The court held that since the policy was not "facially neutral" – and was in fact "specifically race conscious" – any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's motion for summary judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

### **Recent Decisions In Other Circuits Involving The Federal DBE Program And Federally Funded Projects That May Impact The ITD DBE Program**

There are several recent cases involving challenges to the United States Federal DBE Program and its implementation by the states and other governmental entities for federally funded projects. These cases could have a significant impact on the Federal DBE Program and its implementation by ITD, as well as potentially impacting the nature and provisions of ITD's contracting and procurement on federally funded projects, including and relating to the utilization of DBEs. Additionally, these cases provide an instructive analysis of the recent application of the strict scrutiny test to DBE type programs.

#### **Northern Contracting, Inc. v. Illinois, 473 F.3d 715 (7th Cir. 2007).**

In Northern Contracting, Inc. v. Illinois, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's ("IDOT") DBE Program. First, the Seventh Circuit cited Western States Paving Co. and Sherbrooke Turf in holding IDOT could properly rely on the federal government's compelling interest in implementing its local DBE program. The Court held plaintiff Northern Contracting, Inc. ("NCI") forfeited any challenge to the compelling interest prong of the strict scrutiny test by not appealing the decision that the Federal DBE Program was constitutional. The court only considered the challenge to whether IDOT's DBE Program was narrowly tailored, and applied a "clearly erroneous" standard of review.

With respect to the narrow tailoring prong, the Seventh Circuit cited its earlier precedent in Milwaukee County Pavers v. Fielder to hold "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. . . IDOT here is acting as an instrument of federal policy and NCI cannot collaterally attack the federal regulations through a challenge to IDOT's program."

The Seventh Circuit distinguished both the Ninth Circuit decision in Western States Paving Co. and the Eighth Circuit decision in Sherbrooke Turf relating to an as-applied narrow tailoring analysis. The Seventh Circuit stated in a footnote that the Ninth Circuit in Western States Paving Co. "misread" the decision in Milwaukee County Pavers. The Seventh Circuit held instead that a state's application of a federally mandated program must be limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program. The Seventh Circuit analyzed IDOT's compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions, and its use of race-neutral methods set forth in the federal regulations. The Court held that NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Section 26). Accordingly, the Seventh Circuit affirmed the district court upholding the validity of IDOT's DBE program.

**Northern Contracting, Inc. v. Illinois,**  
**2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), aff'd 473 F.3d 715 (7th Cir. 2007).**

This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals and is instructive to the ITD in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnic-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties' motions for summary judgment in Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed infra at number 7. The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the "Plaintiff"), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations ("TEA-21"), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195, at \*1 (N.D. Ill. Sept. 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the "maximum feasible portion" of its DBE goal through race-neutral means. Id. at \*4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. Id. (citing regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

**Statistical Evidence.** To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. Id. at \*6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to IDOT's previous method of reviewing a bidder's list. Id.

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for IDOT's contracting activity and its prime contractors as the State of Illinois; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's Marketplace; (4) the study collected lists of DBEs from IDOT and twenty other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. Id. at \*6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. Id. at \*7. The study thus calculated a weighted average base figure of 22.7%. Id.

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. Id. at \*8. One study examined disparities in earnings and business formation rates as between DBEs and their white male-owned counterparts. Id. Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. Id.

IDOT considered three reports prepared by expert witnesses. Id. at \*9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. Id. The second report concluded, after controlling for relevant variables such as credit worthiness, "that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males." Id. The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. Id.

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they "were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals." Id. Additionally, witnesses identified twenty prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects. Id. The prime contractors did not respond to IDOT's requests for information concerning their utilization of DBEs. Id.

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County's public construction contracts, and a "non-goals" experiment conducted by IDOT between 2001 and 2002), and considered past

utilization of DBEs on IDOT projects. Id. at \*11. After analyzing all of the data, the study recommended an upward adjustment to 27.51%, however, IDOT decided to maintain its figure at 22.77%. Id.

IDOT's representative testified that the DBE program was administered on a "contract-by-contract basis." Id. She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the "lowest responsible bidder." IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (e.g. where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). Id. at \*12. Between 2001 and 2004, IDOT received waiver requests on 8.53% of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. Id.

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court's earlier summary judgment order, including:

- (1) a "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;
- (2) an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);
- (3) reviewing the criteria for prequalification to reduce any unnecessary burdens;
- (4) "unbundling" large contracts; and
- (5) allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses.

Id. (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. Id.

The court found that IDOT attempted to achieve the "maximum feasible portion" of its overall DBE goal through race- and gender-neutral measures. Id. at \*13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43% of its DBE goal, leaving 16.34% to be reached using race- and gender-conscious measures. Id.

**Anecdotal Evidence.** A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. Id. The DBE owners also testified to difficulties in obtaining work in the private sector and "unanimously reported that they were rarely invited to bid on such contracts." Id. The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. Id. A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. Id. at \*13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who "frequently are forced to pay higher insurance rates due to racial and gender discrimination." Id. at \*14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. Id.

The Plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. Id. Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they "occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT." Id. A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects, testified and denied the allegations. Id. at \*15.

The court applied strict scrutiny to the program as a whole (including the gender-based preferences). Id. at \*16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a "'strong basis in evidence' to conclude that remedial action was necessary, *before* it embarks on an affirmative action program. . . . If the government makes such a showing, the party challenging the affirmative action plan bears the 'ultimate burden' of demonstrating the unconstitutionality of the program." Id. The court held that challenging party's burden "can only be met by presenting credible evidence to rebut the government's proffered data." Id. at \*17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show "that there is a demonstrable need for the implementation of the federal DBE program within its jurisdiction." Id. at \*16.

The court found that IDOT presented "an abundance" of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. Id. at \*17. The Plaintiff argued that the study was "erroneous because it failed to limit its DBE availability figures to those firms . . . registered and pre-qualified with IDOT." Id. The Plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. Id. Accordingly, the Plaintiff alleged that IDOT's calculation of DBE availability and utilization rates was incorrect. Id.

The court found that other jurisdictions had utilized the custom census approach without successful challenge. Id. at \*18. Additionally, the court found "that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability." Id. at \*19. The court found that IDOT presented "an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets." Id. at \*21. The court also

found that the statistical studies were consistent with the anecdotal evidence. Id. The court did find, however, that "there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This . . . is [also] supported by the statistical data . . . which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability." Id. at \*21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding, however, the court found that such verification was unnecessary. Id. at \*21, n. 32.

The court further found:

That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: '[E]xperience and size are not race- and gender-neutral variables . . . [DBE] construction firms are generally smaller and less experienced *because of* industry discrimination.'

Id. at \*21, citing Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950 (10<sup>th</sup> Cir. 2003).

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. Id. at \*22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. Id. The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT's fiscal year 2005 goal was a "'plausible lower-bound estimate' of DBE participation in the absence of discrimination." Id. The court found that the Plaintiff did not present persuasive evidence to contradict or explain IDOT's data. Id.

The Plaintiff argued that even if accepted at face value, IDOT's marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. Id. The court found first that IDOT's indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. Id. Second, the court found:

[m]ore importantly, Plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally funded highway contracts. This is a fundamental distinction. . . . [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

Id. at \*23. The court distinguished Builders Ass'n of Greater Chicago v. County of Cook, 123 F. Supp. 2d 1087 (N.D. Ill. 2000), aff'd 256 F.3d 642 (7<sup>th</sup> Cir. 2001), noting that the program in that case was not federally funded. Id. at \*23, n. 34.

The court also found that "IDOT has done its best to maximize the portion of its DBE goal" through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. Id. at \*24. The anti-discrimination efforts included: an internet website where a

DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. Id. The small business initiative included: "unbundling" large contracts; allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses; a "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). Id.

The court found "[s]ignificantly, Plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures." Id. at \*25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. Id. The court found that IDOT approved 70% of waiver requests although waivers were requested on only 8% of all contracts. Id., citing Adarand Constructors, Inc. v. Slater "Adarand VII", 228 F.3d 1147, 1177 (10<sup>th</sup> Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT's DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

**Northern Contracting, Inc. v. State of Illinois,**  
**Illinois DOT, and USDOT, 2004 WL 422704 (N.D. Ill. March 3, 2004)**

This is the earlier decision in Northern Contracting, Inc., 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), see 1A., above, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the Illinois DOT. This case involves the challenge to the Federal DBE Program. The Plaintiff contractor sued the Illinois Department of Transportation and the U.S. DOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 C.F.R. Part 26) as well as the implementation of the Federal Program by the Illinois Department of Transportation (i.e., the IDOT DBE Program). The Court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The Court also held there are issues of fact regarding whether Illinois DOT's ("IDOT") DBE Program is narrowly tailored to achieve the federal government's compelling interest. The court denied the motions for summary judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT's implementation of the Federal DBE Program.

The Court in Northern Contracting, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the Court granted the Federal Defendants' Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the District Court followed the decisions and analysis in Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, 345 F. 3d 964 (8th Cir. 2003) and Adarand Constructors, Inc. v. Slater, 228 F.

3d 1147 (10th Cir. 2000) ("Adarand VII"), cert. granted then dismissed as improvidently granted, 532 U.S. 941, 534 U.S. 103 (2001). The Court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The Court agreed with the Adarand VII and Sherbrooke Turf Courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704, at \*34 citing Adarand VII, 228 F. 3d at 1175.

In addition, the Court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the Court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on Illinois' implementation of the Federal DBE Program.

First, the Court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 C.F.R. § 26.45(b). The Court recognized, as found in the Sherbrooke Turf and Adarand VII cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require "serious, good faith consideration of workable race-neutral alternatives." 2004 WL422704, at \*36, citing and quoting Sherbrooke Turf, 345 F. 3d at 972, quoting Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. at 2344-45 (2003). The Court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides meet this requirement. The Court agreed with the Adarand VII and Sherbrooke Turf Courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the Court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the Court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual's personal net worth exceeds \$750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 C.F.R. § 26.67(b)(1)(d). The Court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every U.S. DOT-assisted contract. If a recipient estimates that it can meet its entire overall

goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 C.F.R. § 26.51(e)(f). Recipients also administering a DBE Program in good faith can not be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 C.F.R. § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 C.F.R. § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 C.F.R. § 26.43.

Fourth, the Court agreed with the Sherbrooke Turf Court's assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the Court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The Court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the Court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every woman and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of \$16.6 million or less (at the time of this decision), and businesses whose owners' personal net worth exceed \$750,000.00 are excluded. 49 C.F.R. § 26.67(b)(1). A firm owned by a white male may qualify as social and economically disadvantaged. 49 C.F.R. § 26.67(d).

The Court analyzed the constitutionality of the Illinois DBE Program. The Court adopted the reasoning of the Eighth Circuit in Sherbrooke Turf, that a recipient's implementation of the Federal DBE Program must be analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the Court agreed with Sherbrooke Turf that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient's implementation of the Federal DBE Program must be narrowly tailored. The Court found that issues of fact remain in terms of the validity of the Illinois DOT's DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government's compelling interest. The Court, therefore, denied the contractor plaintiff's Motion for Summary Judgment and the Illinois DOT's Motion for Summary Judgment.

**Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Road, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004)**

This case is instructive in its analysis of State DOT DBE type programs and their evidentiary basis and implementation. This case also is instructive to ITD in its analysis of the narrowly tailored requirement for State DBE programs. In upholding the challenged Federal DBE Program at issue in this case, the Eighth Circuit emphasized the race-, ethnic- and gender-neutral elements, the ultimate

flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Road, the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 CFR Part 26 ). The Court held the Federal program was narrowly tailored to remedy a compelling governmental interest. The Court also held the federal regulations governing the states' implementation of the Federal DBE Program were narrowly tailored, and the state DOT's implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

Sherbrooke and Gross Seed both contended that the Federal Highway DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment's Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads under a strict scrutiny analysis and held that the Federal DBE Program was valid and constitutional and that the Minnesota DOT's and Nebraska DOR's implementation of the Program also was constitutional and valid. Applying the strict scrutiny analysis, the Court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in Adarand, 228 F. 3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the Court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, Sherbrooke and Gross Seed argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts' below agreed, that participating States need not independently meet the strict scrutiny standard because under the DBE Program the State must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in Adarand. The Eighth Circuit concluded that neither side's position is entirely sound.

The Court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the Court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that federal government delegates this tailoring function, as a State's implementation becomes relevant to a reviewing court's strict scrutiny. Thus, the Court left the question of state implementation to the narrow tailoring analysis.

The Court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored, that is, whether the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors

have the ultimate burden of establishing that the DBE Program is not narrowly tailored. Id. The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the Court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. Id. Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to DOT an overall goal for DBE participation in its federally funded highway contracts. See, 49 C.F.R. § 26.45(f)(1). The overall goal "must be based on demonstrable evidence" as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 C.F.R. § 26.45(b). The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. See, 49 C.F.R. § 26.45(d).

The State must meet the "maximum feasible portion" of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. See, 49 C.F.R. § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the State must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 C.F.R. § 26.45(b). During the course of the year, if a State determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods "[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination." 49 C.F.R. § 26.51(f).

Absent bad faith administration of the program, a State's failure to achieve its overall goal will not be penalized. See, 49 C.F.R. § 26.47. If the State meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. See, 49 C.F.R. § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. See, 49 C.F.R. § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the DOT regulations, on their face, satisfy the Supreme Court's narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F. 3d at 972. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F. 3d at 971, citing Grutter v. Bollinger, 539 U.S. 306.

Second, the revised DBE Program has substantial flexibility. A State may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the Program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds \$750,000.00 cannot qualify as economically disadvantaged. See, 49 C.F.R. § 26.67(b). Likewise, the DBE Program contains built-in durational limits, a State may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 C.F.R. § 26.51(f)(3).

Third, the Court found, the U.S. DOT has tied the goals for DBE participation to the relevant labor markets. The regulations require States to set overall goals based upon the likely number of minority

contractors that would have received federal assisted highway contracts but for the effects of past discrimination. See, 49 C.F.R. § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires the States to focus on establishing realistic goals for DBE participation in the relevant contracting markets. Id. at 972.

Finally, Congress and DOT have taken significant steps, the Court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small business owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a rebuttable presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptably disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F. 3d at 973. For these reasons, the Court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and Gross Seed also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the Federal government nor do recipients have to tie them to any uniform national percentage. 345 F. 3d at 973, citing 64 Fed. Reg. at 5102.

The Court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4% of the prime contractors and subcontractors in a highway construction market. Of this number 0.6% were minority-owned and 10.8% women-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34% higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4% to 11.6%. Based on the study, Minnesota DOT adopted an overall goal of 11.6% DBE participation for Federally assisted highway projects. Minnesota DOT predicted that it would need to meet 9% of that overall goal through race and gender-conscious means, based on the fact DBE participation in State highway contracts dropped from 10.25% in 1998 to 2.25% in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in Sherbrooke. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract to prescribe portion of the project to DBEs, and determine that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data was available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. Id. The precipitous drop in DBE participation when no race-conscious methods were employed, the Court concluded, supports Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. Id. On that record, the Court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability studies of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10% set-aside requirement, 9.95% of all available and capable firms were DBEs, and DBE firms received 12.7% of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95% DBE participation and predicted that 4.82% of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. The Eighth Circuit concluded that *Gross Seed*, like *Sherbrooke*, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the Court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke*. (See district court opinions discussed *infra*.).

***Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unreported decision), aff'd 345 F.3d 964 (8th Cir. 2003)**

*Sherbrooke* involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota Department of Transportation claiming the Federal DBE Provisions of the Transportation Equity Act for the 21st Century ("TEA-21") are unconstitutional. *Sherbrooke* challenged the "federal affirmative action programs," the U.S. DOT implementing regulations, and the Minnesota DOT's participation in the DBE Program. The United States Department of Transportation and the Federal Highway Administration intervened as Federal Defendants in the case. *Sherbrooke*, 2001 WL 1502841, at \*1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The District Court addressed the issue of "random inclusion" of various groups as being within the program in connection with whether the Federal DBE Program is "narrowly tailored." The Court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE program.

The Court held that the Federal DBE Program attempts to avoid the "potentially invidious effects of providing blanket benefits to minorities" in part,

by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals – simply on the basis of their birth – will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.

*Sherbrooke*, 2001 WL 1502841 at \*10 (D. Minn.).

The Court rejected plaintiff's claim that the Minnesota DOT must independently demonstrate how its program comports with Croson's strict scrutiny standard. The Court held that the "Constitution calls out far different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the program." Id. at \*11 (emphasis added). The Court, in a footnote ruled that TEA-21, being a federal program, "relieves the state of any burden to independently carry the strict scrutiny burden." Id. at \*11 n.3. The Court held states that establish DBE programs under TEA-21 and 49 C.F.R. Part 26 are implementing a congressionally required program and not establishing a local one. As such, the Court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. Id.

**Gross Seed Co. v. Nebraska Department of Roads, Civil Action**  
**File No. 4:00CV3073 (D. Neb. May 6, 2002), aff'd 345 F. 3d 964 (8th Cir. 2003)**

The United States District Court for the District of Nebraska held in Gross Seed Co. v. Nebraska (with the United States DOT and Federal Highway Administration as Interveners), that the Federal DBE Program (codified at 49 C.F.R. Part 26) is constitutional. The Court also held that the Nebraska Department of Roads ("NDOR") DBE Program adopted and implemented solely to comply with the Federal DBE Program is "approved" by the Court because the Court found that 49 C.F.R. Part 26 and TEA-21 were constitutional.

The Court concluded, similar to the Court in Sherbrooke Turf, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The Court did not engage in a thorough analysis or evaluation of the NDOR Program or its implementation of the Federal DBE Program. The Court points out that the NDOR Program is adopted in compliance with the Federal DBE Program, and that the U.S. DOT approved the use of NDOR's proposed DBE goals for fiscal year 2001, pending completion of U.S. DOT's review of those goals. Significantly, however, the Court in its findings does note that the NDOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The Court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation is sufficient to demonstrate that past discrimination does exist "in the construction industry" and that racial and gender discrimination "within the construction industry" is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The Court held that the Federal DBE Program was sufficiently "narrowly tailored" to satisfy strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

**Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta, 532 U.S. 941, 534 U.S. 103 (2001)**

This is the Adarand decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that Court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari "as improvidently granted" without

reaching the merits of the case. The Court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the United States DOT DBE Program as it pertains to procurement of federal funds for highway projects let by States, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The Court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The Court also held that the Federal DBE Program is “narrowly tailored,” and therefore upheld the constitutionality of the Federal DBE Program.

It is significant to note that the Court in determining the Federal DBE Program is “narrowly tailored” focused on the current regulations, 49 C.F.R. Part 26, and in particular § 26.1(a), (b), and (f). The Court pointed out that the Federal Regulations instruct recipients as follows:

[y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 C.F.R. § 26.51(a)(2000); see also 49 C.F.R. § 26.51(f)(2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, see 49 C.F.R. § 26.51(b)(2000). The current regulations also outline several race-neutral means available to program recipients including assistance in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. See 49 C.F.R. § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized.

228 F.3d at 1178-1179.

In considering whether the Federal DBE Program is narrowly tailored, the Court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The Court held that insofar as the scope of inquiry suggested was a particular state’s construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress’s power to enact nationwide legislation. Id., at 1185-1186. The Court held that because of the “unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications,” extrapolating findings of discrimination against the various ethnic groups “is more a question of nomenclature than of narrow tailoring.” Id. The Court

found that the “Constitution does not erect a barrier to the government’s effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications.” Id.

Finally, the Tenth Circuit did not specifically address a challenge to the letting of federally funded construction contracts by state departments of transportation. The Court pointed out that plaintiff Adarand “conceded that its challenge in the instant case is to ‘the federal program, implemented by federal officials,’ and not to the letting of federally-funded construction contracts by state agencies.” 228 F.3d at 1187. The Court held that it did not have before it a sufficient record to enable it to evaluate the separate question of Colorado DOT’s implementation of race-conscious policies. Id. at 1187-1188.

**Houston Contrs. Ass’n v. Metro. Transit Auth., 189 F.3d 467 (5th Cir. 1999)**

In this case, the Fifth Circuit vacated a district court opinion ruling on summary judgment against a DBE program. The court noted a sharp conflict in the evidence regarding how the Metropolitan Transit Authority’s (“Metro’s”) DBE program operates in practice. According to Metro’s evidence, its DBE program was an outreach program instituted to reach DBE participation goals. Metro claimed that all that is required of the contractors is that they contact DBEs and give them an opportunity to bid as subcontractors on the project. The plaintiff’s witnesses, on the other hand, contended that Metro coerced prime contractors into using race and sex in selecting subcontractors as a condition to securing Metro contracts. The plaintiff contended that the participation percentages were not “goals”; rather they required contractors to meet a coercive quota.

The Court, asserting these factual issues, vacated the summary judgment order of the District Court declaring Metro’s DBE program unconstitutional as applied to non-federally funded contracts. The Court also vacated the injunction predicated on this conclusion, and remanded the case to the District Court for further proceedings. The Court vacated the injunction on federally-funded contracts because the Court had not permitted the United States to intervene as a party.

**Klaver Construction, Inc. v. Kansas DOT, 211 F. Supp. 2d 1296 (D. Kan. 2002)**

This is another case that involved a challenge to the U.S. DOT Regulations that implement TEA-21 (49 C.F.R. Part 26), in which the plaintiff contractor sought to enjoin the Kansas Department of Transportation (“DOT”) from enforcing its DBE Program on the grounds that it violates the Equal Protection Clause under the Fourteenth Amendment. This case involves a direct constitutional challenge to racial and gender preferences in federally-funded state highway contracts. This case concerned the constitutionality of the Kansas DOT’s implementation of the federally-funded DBE Program, and the constitutionality of the gender-based policies of the federal government and the race- and gender-based policies of the Kansas DOT. The Court granted the Federal and State Defendants’ (U.S. DOT and Kansas DOT) Motions to Dismiss based on lack of standing. The Court held the contractor could not show the specific aspects of the DBE program that it contends are unconstitutional have caused its alleged injuries.

## **Recent Decisions and Authorities Involving Federal Procurement That May Impact the ITD DBE Program**

**Rothe Development Corp. v. U.S. Department of Defense, 413 F.3d 1327 (Fed. Cir. 2005) (affirming in part, vacating in part, and remanding) 324 F. Supp. 2d 840 (W.D. Tex. 2004).**

Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In Rothe, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that five (5%) percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. 10 U.S.C. § 2323. Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms upwards by ten (10%) percent (the "Price Evaluation Adjustment Program" or "PEA").

The District Court held the federal statute, as reauthorized in 2003, was constitutional on its face. The Court held the 5% goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The Plaintiff appealed the decision.

The Federal Circuit found that the "analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization." The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, "the evidence must be proven to have been before Congress prior to enactment of the racial classification." The Federal Circuit held that the District Court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the District Court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

**Rothe Devel. Corp. v. U.S. Dept. of Defense, Civil Action No. SA-98-CV-1011-XR (W.D. Tex. Aug. 10, 2007)**

On August 10, 2007 the federal district court for the Western District of Texas in Rothe Development Corp. v. U.S. Department of Defense, et al. (Civ. Action No. SA-98-CV-1011-XR) (W.D. Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in Rothe, 413 F.3d 1327 (Fed Cir. 2005), discussed above. The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences

in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals ("SDBs"). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was "stale," that the Plaintiff contractor (Rothe) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in Concrete Works, Adarand Constructors, Sherbrooke Turf and Western States Paving (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

As pointed out in Section VI(1) above in the discussion in the Federal Circuit decision, this case does not directly involve the Federal DBE Program, but relates to a federal program for the U.S. Department of Defense ("DOD") concerning federal contracts. The case considers certain evidence before Congress that is relied in part by the cases upholding the validity of the Federal DBE Program that was discussed above in the Western States Paving, Adarand Constructors, Sherbrooke Turf, and Northern Contracting cases.

**Facts.** In the Section 1207 Act, Congress set a goal that five per cent (5%) of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to ten per cent (10%) (the "Price Evaluation Adjustment Program" or "PEA") 10 U.S.C. § 2323(e)(3). Rothe, Slip Op. at 8. Plaintiff Rothe did not qualify as an SDB because it was owned by a Caucasian female. Although Rothe was technically the lowest bidder on a DOD contract, its bid was adjusted upward by ten per cent (10%), and a third party, who qualified as a SDB, became the "lowest" bidder and was awarded the contract. Id. Rothe claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. Id. at 8-9. The district court's decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

**Rejection of Rothe's Arguments.** The district court initially rejected six (6) legal arguments made by Rothe regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the Sherbrooke Turf, Western States Paving, Concrete Works, Adarand VII cases, and the Federal Circuit Court of Appeal in Rothe. Rothe, Slip Op. at 85-90. The court rejected the following legal arguments made by Rothe:

- (1) The government must establish that it has discriminated against minority-owned businesses in order to satisfy its burden of production;
- (2) The court must reject anecdotal and statistical evidence of discrimination unless those claims were actually "adjudicated" and the discrimination was proven to have occurred;
- (3) All evidence contained in Congressional Committee Reports, hearing records and floor statements must be rejected on procedural grounds because that evidence is hearsay and is unreliable due to "the political nature of Congress;"

- (4) The government must prove discrimination as to every racial sub-class identified in the regulations;
- (5) The relevant industry sector for purposes of strict scrutiny review is the "computer maintenance and repair" sub-sector, not the "business services" sector; and
- (6) Only evidence of discrimination and DOD procurement is admissible; evidence of state and local discrimination in contracting is irrelevant because "there is no private or state or local defense industry." Rothe, Slip Op. at 85-90.

The district court found that all six (6) arguments have no merit. Id. at 87. In addressing Rothe's sixth argument above, Rothe was arguing that the government could not rely on the evidence of state and local discrimination and contracting because it argued there was no private or state or local defense industry. The court rejected that argument finding that Rothe ignores the "passive participant" doctrine, which the Federal Circuit and other Courts of Appeals acknowledged. The court found that the DOD is a "passive participant" in a system of racial exclusion practiced by elements of various state and local contracting sectors because the government has compiled evidence of marketplace discrimination and linked its spending practices to that private or public discrimination. Rothe, Slip Op. at 88, citing Concrete Works IV, 321 F.3d 950, at 976.

**The Legal Analysis in Sherbrooke Turf, Concrete Works IV, Adarand VII, and Western States Paving is Relevant.** The court discussed and cited the decisions in Adarand VII (2000), Sherbrooke Turf (2003), and Western States Paving (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the *Appendix*), more than satisfied the government's burden of production regarding the compelling interest for a race-conscious remedy. Rothe, Slip Op. at 88-90. Because the Urban Institute Report, which presented its analysis of thirty-nine (39) state and local disparity studies, was cross-referenced in the *Appendix*, the district court found the courts in Adarand VII, Sherbrooke Turf, and Western States Paving, also relied on it in support of their compelling interest holding. Id.

The district court found that the Tenth Circuit in Concrete Works II, 36 F.3d 1513 (10th Cir. 1994) established certain legal principles relevant to the district court's strict scrutiny analysis in this case. Rothe, Slip Op. at 90. First, the court held that Rothe had standing to challenge the facial constitutionality of the 2006 Reauthorization. Second, the federal government has a compelling interest to prevent itself from acting as a passive participant in a system of racial exclusion by allowing public tax dollars to finance the evils of private prejudice. Third, the government is not limited to remedying only its own past or present discrimination in the defense contracting industry because it may design the 1207 Program to prevent public tax dollars from financing the evils of private prejudice. Fourth, anecdotal evidence of public and private race discrimination contained in Congressional hearings, floor debate and reports considered by Congress are appropriate supplementary evidence in the strict scrutiny analysis. Fifth, Rothe's conclusory objections to the government's empirical evidence did not raise a genuine issue of material fact. Six, Rothe's expert testimony attacking the government's empirical evidence based on the reliability of underlying data, the methodology of the study, and/or the interpretation of the study's results can raise a genuine issue of material fact. Seventh, the government may rely on disparity indices contained in empirical

reports in order to meet its burden of production. Eighth, although Croson does not require that a governmental entity identify an exact linkage between its award of public contracts and private discrimination, such evidence would enhance the governmental entity's factual predicate for a race-conscious program. Rothe, Slip Op. at pages 91-93. The Court rejected all of Rothe's arguments to the contrary.

The court also found that the Tenth Circuit decision in Concrete Works IV, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the Court's strict scrutiny analysis. First, Rothe's claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce "credible, particularized" evidence to rebut the government's initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government's statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. Rothe, Slip Op. at 93-94.

Based on Concrete Works IV, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. Rothe, Slip Op. at 94.

The court found evidence of discriminatory barriers to the formation of businesses by minorities was sufficient to show a "strong link" between a government's disbursement of public funds and the channeling of those funds due to private discrimination. Rothe, Slip Op. at 95. The court stated evidence of private discrimination that results in barriers to business formation is relevant because it demonstrates that SDBs are precluded at the outset from competing for the public contracts, and evidence of barriers to fair competition is relevant because it demonstrates that existing SDBs are precluded from competing. Id.

The district court also cited with support the Tenth Circuit decision in Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) (Adarand VII). The court noted that in Adarand VII, the Tenth Circuit held that Congress may rely on evidence of discriminatory barriers to the formation of SDBs due to private discrimination, barriers to fair competition for public construction contracts, and local disparity studies to establish a strong basis in the evidence. Rothe, Slip Op. at 96, citing Adarand VII. The district court stated out that in Adarand VII the Tenth Circuit held Congress is not required to make specific findings regarding discrimination against every single sub-category of individual within the broad racial and ethnic categories designated in the challenged statute and regulations. Id.

The court pointed out that the details of the strict scrutiny standard enunciated by the Federal Circuit in Rothe III and Rothe V conflict to some degree with the Tenth Circuit's analysis in Concrete Works IV and Adarand VII, the Eighth Circuit's analysis in Sherbrooke Turf, and the Ninth Circuit's analysis in Western States Paving. Rothe, Slip Op. at 97-99.

**Congress Had a Compelling Interest for the 2006 Reauthorization of the 1207 Program.** The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six (6) state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six (6) disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. Rothe, Slip Op. at 102-107.

The court found that these six (6) state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and "they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting." Id., Slip Op. at 107. The court found that the data used in these six (6) disparity studies is not "stale" for purposes of strict scrutiny review. Id. The Court disagreed with Rothe's argument that all the data was stale (data in the studies from 1997 through 2002), "because this data was the most current data available at the time that these studies were performed." Rothe, Slip Op. at 108. The court found that the governmental entities should be able to rely on the most recently available data so long as that data is reasonably up-to-date. Id., Slip Op. at 108-109. The court declined to adopt a "bright-line rule for determining staleness." Id.

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the United States Department of Transportation MBE [now DBE] Program, and rejected five (5) years as a bright-line rule for considering whether data is "stale." Id., Slip Op. at 109, footnote 86. The court also stated that it "accepts the reasoning of the *Appendix*, which the court found stated that for the most part "the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question whether the federal government has a compelling interest to take remedial action in its own procurement activities." Rothe, Slip Op. at 108, quoting 61 Fed.Reg. 26042-01, 26061 (1996).

The court then discussed each of the six (6) studies and the findings of those studies. The court rejected the argument made by Rothe against the studies by stating that Rothe's objections to the data and reliability of the six (6) disparity studies were not supported by an expert report or other competent summary judgment evidence. Rothe, Slip Op. at 123. The court found that Rothe did not properly rebut the government's statistical evidence, including the six (6) disparity studies, but instead only provided generalized, conclusory objections that the court found were "of little persuasive value." Id.

The court also found that the anecdotal evidence presented by the six (6) disparity studies was sufficient, and that Rothe had failed to rebut the anecdotal evidence.

The Court found that the study entitled *Federal Procurement After Adarand*, which was conducted by the United States Commission on Civil Rights, was before Congress prior to the 2006 Reauthorization of the 1207 Program. The Court noted that the Majority Opinion in *Federal Procurement After Adarand* advocated that the federal government exclusively adopt race-neutral programs and that federal agencies had failed to adequately consider race-neutral alternatives in the manner required by *Adarand III*. *Rothe*, Slip Op. at 153. The Court discussed the Dissenting Opinion by Commissioner Michael Yaki that criticized the Majority Opinion, including noting that his statistical data was "*deleted*" from the original version of the draft Majority Opinion that was received by all Commissioners. *Rothe*, Slip Op. at 153-154 (emphasis in original). The court reviewed the statistical data from Commissioner Yaki and found that it was not categorically stale, but was less probative of present-day discrimination than the six (6) state and local disparity studies. *Rothe*, Slip Op. at 154, footnote 107. The court stated that Rothe did not produce "concrete, particularized" evidence challenging the Yaki statistical evidence. The court found that Rothe could not rely on the Majority Opinion's generalized objections to the Dissenting Opinion's statistical evidence for the same reason that it could not rely on its own generalized objections to the six (6) disparity studies that were before Congress prior to the 2006 Reauthorization. *Rothe*, Slip Op. at 155.

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Rothe*, Slip Op. 155 -164. The Court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.*, Slip Op. at 164-166.

The district court found that the data contained in the *Appendix*, the Benchmark Study, and the Urban Institute Report was "stale," and the Court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Rothe*, Slip Op. at 166-175. The court also found that Rothe's expert report raised a genuine issue of material fact as to the reliability of the methodology of the Benchmark Study. The court stated that the Eighth, Ninth and Tenth Circuits relied on the *Appendix* to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Rothe*, Slip Op. at 166-167. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on this data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.*, Slip Op. at 170.

The district court found that *Rothe*'s expert reports contain concrete, particularized rebuttal evidence that raised a genuine issue of material fact regarding the reliability of the *Appendix*, the Urban Institute Report, and the Department of Commerce's Benchmark Study. Although the Court found that the data contained in the *Appendix*, the Urban Institute Report, and the Benchmark Study was stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six (6) state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with "concrete, particularized" evidence to the contrary. *Rothe*, Slip Op. at 172-173. The district

court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. Rothe, Slip Op. at 173.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. Rothe, Slip Op. at 176. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five (5) purportedly disadvantaged racial groups. Rothe, Slip Op. at 176.

**The 2006 Reauthorization of the 1207 Program Was Narrowly Tailored.** The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government's involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the Department of Defense and Department of Air Force had become passive participants in perpetuating it. Rothe, Slip Op. at 177. The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in Rothe III had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. Rothe, Slip Op. at 177, quoting Rothe III, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three (3) factors:

- (1) The efficacy of race-neutral alternatives;
- (2) Evidence detailing the relationship between the stated numerical goal of five percent (5%) and the relevant market; and
- (3) Over- and under-inclusiveness.

Rothe, Slip Op. at 177-178. The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in the federal procurement. Id., Slip Op. at 178. The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. Rothe, Slip Op. at 178-181. The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. Rothe, Slip Op. at 181. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." Rothe, Slip Op. at 181.

The district court also found that the five percent (5%) goal was related to the minority business availability identified in the six (6) state and local disparity studies. Rothe, Slip Op. at 182. The court concluded that the five per cent (5%) goal was aspirational, not mandatory. Id. The court also

found that the availability analysis contained in all six (6) disparity studies indicated that on average, Minority Business Enterprises in the United States who are ready, willing, and able to bid on Department of Defense contracts far exceeds the five per cent (5%) aspirational goal set by the program. Rothe, Slip Op. at 183. The court found that the five per cent (5%) inspirational goal is far less than the overall proportion of small minority businesses presently participating in the United States economy. Id.

The court then examined and found that the regulations implementing the 1207 Program are not over-inclusive for several reasons, including: (1) The PEA regulations were amended to allow the Department of Commerce to recalculate the PEA on an annual basis based on relevant empirical data; (2) The 1207 Program requires suspension of the PEA if the five per cent (5%) goal was reached in the previous year; (3) The economic disadvantage regulations were amended to require an individualized showing of economic disadvantaged; (4) The burden of proof for non-minority firms to qualify as socially disadvantaged under Section 8(a) regulations were lowered from clear and convincing evidence to preponderance of the evidence, thus making it easier for non-minority firms to qualify for SDB status; (5) The regulations allow any interested party to challenge a SDB certification; and (6) The regulations allow the presumption of social disadvantage to be overcome with credible evidence to the contrary. Rothe, Slip Op. at 183-186.

**Conclusion.** In conclusion, the court granted summary judgment to the defendants, denied summary judgment to the plaintiffs, and held that the 2006 Reauthorization of the 1207 Program was constitutional.

**Rothe Development Corp. v. United States Dept. of Defense, 2006 WL 2052944 (W.D. Tex. Jul. 24, 2006) (unpublished opinion)**

On remand from the Federal Circuit's opinion, see Section V.1 supra, this case considered the constitutionality of Section 1207 of the National Defense Authorization Act of 1987 (the "Act"), in which Congress set a goal that 5% of defense contracts would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals (SDBs) under 10 U.S.C. § 2323. Under the Act, Congress authorized the Department of Defense (DOD) to upwardly adjust bids of non-SDBs by 10%. Plaintiff Rothe was technically the lowest bidder on a contract, however, due to the upward adjustment, the contract was awarded to an SDB; Rothe challenged both the 5% goal and the 10% upward adjustment as violative of the Equal Protection of the Fifth Amendment. The trial court upheld the constitutionality of the Act and the Federal Circuit vacated and remanded. This case came before the trial court on a number of cross motions by the parties.

The court first held that although Rothe had the burden to prove the program was unconstitutional, the DOD bore the burden of presenting evidentiary support to determine whether the legislative body had a "strong basis in evidence" to believe that race-based remedial action was necessary. Plaintiff Rothe requested the court to exclude all "stale evidence" based upon the May 2006 report by the U.S. Commission on Civil Rights titled *Disparity Studies as Evidence of Discrimination in Federal Contracting*. Rothe further argued that "Congress had no evidence before it that can be relied upon because 'in the context of 'politically charged affirmative action programs' and 'the political nature of Congress,' Congress cannot be relied upon."

The DOD argued that the older data relied upon Congress was "necessary to demonstrate the 'lingering effects of discrimination'" and that such evidence was presented only to serve as a "baseline

or marker indicating the level of discrimination at a particular point in time." The court found pursuant to the Federal Circuit's remand decision, the "evidence [before Congress] must be proven to have been before Congress prior to enactment of the racial classification." Additionally, the DOD was required to make a showing that the data presented was not "so outdated that it fails to provide a strong basis in evidence for the reauthorizations [of the race-conscious program]." Although the court declined to strike any stale evidence as part of the current discovery motions, the court held that in analyzing future dispositive motions, the Federal Circuit mandated the district court "conduct a 'detailed, skeptical, non-deferential analysis' as undertaken by the Croson Court . . . [and] be satisfied that a 'strong basis in evidence' supports the legislature's conclusion that discrimination persisted and remedial action was needed."

The court held that Rothe could engage in further limited discovery as to whether there still existed a compelling need for the challenged program and whether it was still narrowly tailored. The court also held that Rothe could propound certain discovery requests upon the Defendants including requesting specific statistical information.

### **"Federal Procurement After Adarand" (USCCR Report September 2005)**

In September of 2005, the United States Commission on Civil Rights (the "Commission") issued its report entitled "Federal Procurement After Adarand" setting forth its findings pertaining to federal agencies' compliance with the constitutional standard enunciated in Adarand. United States Commission on Civil Rights: Federal Procurement After Adarand (Sept. 2005), available at <http://www.usccr.gov>, citing Adarand, 515 U.S. at 237-38. The following is a brief summary of the report.

In 1995, the United States Supreme Court decided Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), which set forth the constitutional standard for evaluating race-conscious programs in federal contracting. The Commission states in its report that the Court in Adarand held that racial classifications imposed by federal, state and local governments are subject to strict scrutiny and the burden is upon the government entity to show that the racial classification is the least restrictive way to serve a "compelling public interest;" the government program must be narrowly tailored to meet that interest. The Court held that narrow tailoring requires, among other things, that "agencies must first consider race-neutral alternatives before using race conscious measures." [p. ix]

**Scope and Methodology of the Commission's Report.** The purpose of the Commission's study was to examine the race-neutral programs and strategies implemented by agencies to meet the requirements set forth in Adarand. Accordingly, the study considered the following questions:

- Do agencies seriously consider workable race-neutral alternatives, as required by Adarand?
- Do agencies sufficiently promote and participate in race-neutral practices such as mentor-protégé programs, outreach, and financial and technical assistance?
- Do agencies employ and disclose to each other specific best practices for consideration of race-neutral alternatives?
- How do agencies measure the effects of race-neutral programs on federal contracting?
- What race-neutral mechanisms exist to ensure government contracting is not discriminatory?

The Commission's staff conducted background research, reviewing government documents, federal procurement and economic data, federal contracting literature, and pertinent statutes, regulations and court decisions. The Commission selected seven (7) agencies to study in depth and submitted interrogatories to assess the agencies' procurement methods. The agencies selected for evaluation procure relatively large amounts of goods and services, have high numbers of contracts with small businesses, SDBs, or HUBZone firms, or play a significant support or enforcement role: the Small Business Administration (SBA), and the Departments of Defense (DOD), Transportation (DOT), Education (DOEd), Energy (DOEn), Housing and Urban Development (HUD), and State (DOS).

The report did not evaluate existing disparity studies or assess the validity of data suggesting the persistence of discrimination. It also did not seek to identify whether, or which, aspects of the contracting process disparately effect minority-owned firms.

**Findings and Recommendations.** The Commission concluded that "among other requirements, agencies must consider race-neutral strategies before adopting any that allow eligibility based, even in part, on race." [p. ix] The Commission further found "that federal agencies have not complied with their constitutional obligation, according to the Supreme Court, to narrowly tailor programs that use racial classifications by considering race-neutral alternatives to redress discrimination." [p. ix]

The Commission found that "agencies have largely failed to apply the Supreme Court's requirements, or [the U.S. Department of Justice's ("DOJ")] guidelines, to their contracting programs." [p. 70] The Commission found that agencies "have not seriously considered race-neutral alternatives, relying instead on SBA-run programs, without developing new initiatives or properly assessing the results of existing programs." [p. 70]

The Commission identified four elements that underlie "serious consideration" of race-neutral efforts, ensure an inclusive and fair race-neutral system, and tailor race-conscious programs to meet a documented need: "Element 1: Standards—Agencies must develop policy, procedures, and statistical standards for evaluating race-neutral alternatives; Element 2: Implementation—Agencies must develop or identify a wide range of race-neutral approaches, rather than relying on only one or two generic government-wide programs; Element 3: Evaluation—Agencies must measure the effectiveness of their chosen procurement strategies based on established empirical standards and benchmarks; Element 4: Communication—Agencies should communicate and coordinate race-neutral practices to ensure maximum efficiency and consistency government-wide." [p. xi]

The Commission found that "despite the requirements that Adarand imposed, federal agencies fail to consider race-neutral alternatives in the manner required by the Supreme Court's decision." [p. xiii] The Commission also concluded that "[a]gencies engage in few race-neutral strategies designed to make federal contracting more inclusive, but do not exert the effort associated with serious consideration that the Equal Protection Clause requires. Moreover, they do not integrate race-neutral strategies into a comprehensive procurement approach for small and disadvantaged businesses." [p. xiii]

### **Serious Consideration [P. 71]**

**Finding:** Most agencies could not demonstrate that they consider race-neutral alternatives before resorting to race-conscious programs. Due to the lack of specific guidance from the DOJ, "agencies appear to give little thought to their legal obligations and disagree both about what the law requires and about the legal ramifications of their actions."

**Recommendation:** Agencies must adopt and follow guidelines to ensure consideration of race-neutral alternatives, which system could include: (1) identifying and evaluating a wide range of alternatives; (2) articulating the underlying facts that demonstrate whether race-neutral plans work; (3) collecting empirical research to evaluate success; (4) ensuring such assessments are based on current, competent and comprehensive data; (5) periodically reviewing race conscious plans to determine their continuing need; and (6) establishing causal relationships before concluding that a race-neutral plan is ineffective. Best practices could include: (1) statistical standards by which agencies would determine when to abandon race-conscious efforts; (2) ongoing data collection, including racial and ethnic information, by which agencies would assess effectiveness; and (3) policies for reviewing what constitutes disadvantaged status and the continued necessity for strategies to increase inclusiveness.

### **Antidiscrimination Policy And Enforcement [P. 72]**

**Finding:** The federal government lacks an appropriate framework for enforcing nondiscrimination in procurement. Limited causes of action are available to contractors and subcontractors, but the most accessible mechanisms are restricted to procedural complaints about bidding processes.

**Recommendation:** The enactment of legislation expressly prohibiting discrimination based on race, color, religion, sex, national origin, age, and disability, in federal contracting and procurement. Such legislation should include protections for both contractors and subcontractors and establish clear sanctions, remedies and compliance standards. Enforcement authority should be delegated to each agency with contracting capabilities.

**Finding:** Most agencies do not have policies or procedures to prevent discrimination in contracting. Generally, agencies are either unaware of or confused about whether federal law protects government contractors from discrimination.

**Recommendation:** The facilitation of agency development and implementation of civil rights enforcement policies for contracting. Agencies must establish strong enforcement systems to provide individuals a means to file and resolve complaints of discriminatory conduct. Agencies must also adopt clear compliance review standards and delegate authority for these functions to a specific, high-level component. Once agencies adopt nondiscrimination policies, they should conduct regular compliance reviews of prime and other large contract recipients, such as state and local agencies. Agencies should widely publicize complaint procedures, include them with bid solicitations, and codify them in acquisition regulations. Civil rights personnel in each agency should work with procurement officers to ensure that contractors understand their rights and responsibilities and implement additional policies upon legislative action.

**Finding:** Agencies generally employ systems for reviewing compliance with subcontracting goals made at the bidding stage, but do not establish norms for the number of reviews they will conduct, nor the frequency with which they will do so.

**Recommendation:** Good faith effort policies should be rooted in race-neutral outreach. Agencies should set standards for and carry out regular on-site audits and formal compliance reviews of SDB subcontracting plans to make determinations of contractors' good faith efforts to achieve established goals. Agencies should develop and disseminate clear regulations for what constitutes a good faith effort, specific to individual procurement goals and procedures. Agencies should also require that all prime contractors be subject to audits, and require prime contractors to demonstrate all measures taken to ensure equal opportunity for SDBs to compete, paying particular attention to contractors that have not achieved goals expressed in their offers.

### **Ongoing Review [P. 73]**

**Finding:** Narrow tailoring requires regular review of race-conscious programs to determine their continued necessity and to ensure that they are focused enough to serve their intended purpose. However, no agency reported policies, procedures, or statistical standards for when to use race-conscious instead of race-neutral strategies, nor had agencies established procedures to reassess presumptions of disadvantage.

**Recommendation:** Agencies must engage in regular, systematic reviews (perhaps biennial) of race-conscious programs, including those that presume race-based disadvantage. They should develop and document clear policies, standards and justifications for when race-conscious programs are in effect. Agencies should develop and implement standards for the quality of data they collect and use to analyze race-conscious and race-neutral programs and apply these criteria when deciding effectiveness. Agencies should also evaluate whether race-neutral alternatives could reasonably generate the same or similar outcomes, and should implement such alternatives whenever possible.

### **Data And Measurement [Pp. 73-75]**

**Finding:** Agencies have neither conducted race disparity studies nor collected empirical data to assess the effects of procurement programs on minority-owned firms.

**Recommendation:** Agencies should conduct regular benchmark studies which should be tailored to each agency's specific contracting needs; and the results of the studies should be used in setting procurement goals.

**Finding:** The current procurement data does not evaluate the effectiveness or continuing need for race-neutral and/or race-conscious programs.

**Recommendation:** A task force should determine what data is necessary to implement narrow tailoring and assess whether (1) race-conscious programs are still necessary, and (2) the extent to which race-neutral strategies are effective as an alternative to race-conscious programs.

**Finding:** Agencies do not assess the effectiveness of individual race-neutral strategies (e.g. whether contract unbundling is a successful race-neutral strategy).

**Recommendation:** Agencies should measure the success of race-neutral strategies independently so they can determine viability as alternatives to race-conscious measures (e.g. agencies could track the number and dollar value of contracts broken apart, firms to which smaller contracts are awarded, and the effect of such efforts on traditionally excluded firms).

### **Communication And Collaboration [P. 75]**

**Finding:** Agencies do not communicate effectively with each other about efforts to strengthen procurement practices (e.g. there is no exchange of race-neutral best practices).

**Recommendation:** Agencies should engage in regular meetings with each other to share information and best practices, coordinate outreach, and develop measurement strategies.

### **Outreach [P. 76]**

**Finding:** Even though agencies engage in outreach efforts, there is little evidence that their efforts to reach small and disadvantaged businesses are successful. They do not produce planning or reporting documents on outreach activities, nor do they apply methods for tracking activities, expenditures, or the number and types of beneficiaries.

**Recommendation:** Widely broadcast information on the Internet and in popular media is only one of several steps necessary for a comprehensive and effective outreach program. Agencies can use a variety of formats – conferences, meetings, forums, targeted media, Internet, printed materials, ad campaigns, and public service announcements – to reach appropriate audiences. In addition, agencies should capitalize on technological capabilities, such as listservs, text messaging, audio subscription services, and new technologies associated with portable listening devices, to circulate information about contracting opportunities. Agencies should include outreach in budget and planning documents, establish goals for conducting outreach activities, track the events and diversity of the audience, and train staff in outreach strategies and skills.

**Conclusion.** The Commission found that ten (10) years after the Court's Adarand decision, federal agencies have largely failed to narrowly tailor their reliance on race-conscious programs and have failed to seriously consider race-neutral decisions that would effectively redress discrimination. Although some agencies employ some race-neutral strategies, the agencies fail "to engage in the basic activities that are the hallmarks of serious consideration," including program evaluation, outcomes measurement, reliable empirical research and data collection, and periodic review.

The Commission found that most federal agencies have not implemented "even the most basic race-neutral strategy to ensure equal access, i.e., the development, dissemination, and enforcement of clear, effective antidiscrimination policies. Significantly, most agencies do not provide clear recourse for contractors who are victims of discrimination or guidelines for enforcement."

One Commission member, Michael Yaki, filed an extensive Dissenting Statement to the Report. [pp. 79-170]. This Dissenting Statement by Commissioner Yaki was referred to and discussed by the district court in Rothe Development Corp. v. US DOD, Slip Op. at 154-155 (W.D. Tex. Aug. 10, 2007) (see discussion of Rothe above at Section VI, 1A.). In his dissent, Commissioner Yaki criticized the Majority Opinion, including noting that his statistical data was "*deleted*" from the original version of the draft Majority Opinion that was received by all Commissioners. The district court in Rothe considered the data discussed by Yaki.

## **Decisions Involving State or Local Government M/WBE Programs That May Impact The ITD DBE Program**

### **Decisions in the Ninth Circuit**

#### **Monterey Mechanical v. Wilson, 125 F.3d 702 (9th Cir. 1997)**

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a M/WBE type program. Although the program at issue utilized the term "goals" as opposed to "quotas," the Ninth Circuit rejected such a distinction, holding "[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." The case also is instructive because it found the use of "goals" and the application of "good faith efforts" in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the "Plaintiff") submitted the low bid for a construction project for the California Polytechnic State University (the "University"). 125 F.3d 702, 704 (9th Cir. 1994). The University rejected the Plaintiff's bid because the Plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23% of the work to M/WBEs or, alternatively, demonstrate good faith outreach efforts. Id. The Plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to M/WBEs but did include documentation of good faith outreach efforts. Id.

Importantly, the University did not conduct a disparity study, and instead argued that because "the 'goal requirements' of the scheme '[did] not involve racial or gender quotas, set-asides or preferences,'" the University did not need a disparity study. Id. at 705. The Plaintiff protested the contract award and sued the University's trustees, and a number of other individuals (collectively the "Defendants") alleging the state law was violative of the Equal Protection Clause. Id. The district court denied the Plaintiff's motion for an interlocutory injunction and the Plaintiff appealed to the Ninth Circuit Court of Appeals (the "Court"). Id.

The Defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the M/WBE participation goals. Id. at 708. The Court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. Id. at 709. The Court held that contrary to the district court's finding, such a difference was not *de minimis*. Id.

The Defendant's also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. Id. at 710. The Court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, "they are rigid in requiring precisely described and monitored efforts to attain those goals." Id. The Court cited its own earlier precedent to hold that "the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas. . . . [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." Id. at 710-11 (internal citations and quotations omitted). The Court found that the statute encouraged set asides and cited Concrete Works of Colorado v. Denver, 36 F.3d 1512 (10th Cir. 1994), as analogous support for the proposition. Id. at 711.

The Court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although "worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness." Id. The Court also noted that the statute may impose additional compliance expenses upon non-MWBE firms who are required to make good faith outreach efforts (e.g. advertising) to MWBE firms. Id. at 712.

The Court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. Id. at 712-13. The Court found the University presented "no evidence" to justify the race- and gender-based classifications and thus did not consider additional issues of proof. Id. at 713. The Court found that the statute was not narrowly tailored because the definition of "minority" was overbroad (e.g. inclusion of Aleuts). Id. at 714, citing Wygant v. Jackson Board of Education, 476 U.S. 267, 284, n. 13 (1986) and City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 505-06 (1989). The Court found "[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny." Id. at 714, citing Hopwood v. State of Texas, 78 F.3d 932, 951 (5th Cir. 1996). The Court held that the statute violated the Equal Protection Clause.

**Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991)**

In Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington's minority and women business set-aside program in light of the standard set forth in City of Richmond v. J.A. Croson Co. The Court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence, was problematic to the compelling government interest component of the strict scrutiny analysis. The Court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong, the Court found that although the program included race-neutral alternative measures and was flexible (i.e. included a waiver provision), the over breadth of the program to include MBE's outside of King County was fatal to the narrow tailoring analysis. The Court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the Court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

**Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity, 950 F.2d 1401 (9th Cir. 1991) ("AGCC")**

In Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity, 950 F.2d 1401 (9th Cir. 1991) ("AGCC"), the Ninth Circuit denied plaintiffs request for preliminary injunction to enjoin enforcement of the city's bid preference program. Although an older case, AGCC is instructive as to the analysis conducted by the Ninth Circuit. The Court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. 950 F.2d at 1413-18.

## **Decisions in Other Circuits**

### **Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc., 460 F.3d 859 (7th Cir. 2006)**

In Rapid Test Products, Inc. v. Durham School Services Inc., the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an "entitlement" in disadvantaged businesses to receive contracts subject to set aside programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. ("Durham"), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. ("Rapid Test"), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test's competitor's, an business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid's owner was a black woman.

The district court granted summary judgment in favor of Durham holding the parties' dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that "§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate." If race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the Seventh Circuit Court of Appeals remanded the case to the district court to determine whether Rapid Test had evidence to back up its claim that race and sex discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham's decision to hire Rapid Test's competitor.

### **Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development, 438 F.3d 195 (2d Cir. 2006)**

This recent case is instructive to the ITD and the disparity study in connection with the determination of the groups that may be included in a M/WBE type program, and the standard of analysis utilized to evaluate a local government's non-inclusion of certain groups. In this case, the Second Circuit Court of Appeals held racial classifications that are challenged as "under-inclusive" (i.e. those that exclude persons from a particular racial classification) are subject to a "rational basis" review, not strict scrutiny.

Plaintiff Luiere, a seventy-percent (75) shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the U.S. Department of Transportation regulations,

49 C.F.R. § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race." Id. at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. Id.

However, unlike the federal regulations, the State of New York's local minority-owned business program included in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." The definition did not include all persons from, or descendants of persons from, Spain or Portugal. Id. Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. Id. at 202-03. The Plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of "Hispanic" was fatally under-inclusive. Id. at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis "allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program." Id. at 206. The Court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. Id. at 207-08. The Court similarly rejected the argument that the state should mirror the federal definition of "Hispanic," finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. Id. at 209.

The Court opined – without deciding – that it may be impermissible for New York to simply adopt the "federal USDOT definition of Hispanic without at least making an independent assessment of discrimination against Hispanics of Spanish Origin in New York." Id. Additionally, finding that the Plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the Court determined that the rational basis analysis was appropriate. Id. at 213.

The Court held that the Plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the Plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York's decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. Id. at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

**Virdi v. Dekalb County School District, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion)**

Although it is an unpublished opinion, Virdi v. DeKalb County School District is a recent Eleventh Circuit decision reviewing a challenge to a local government M/FBE type program, which is instructive to ITD and the disparity study. In Virdi, the Eleventh Circuit struck down a M/WBE type goal program that the Court held contained racial classifications. The Court based its ruling primarily due to the failure of the DeKalb County School District (the "District") to seriously consider and implement a race-neutral program, and due to the infinite duration of the program.

Plaintiff Virdi, an Asian-American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the "Board") and the Superintendent (both individually and in his official capacity) (collectively "Defendants") pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11th Cir. 2005). Virdi also alleged the school district's Minority Vendor Involvement Program was facially unconstitutional. Id.

The district court initially granted the Defendants' motions for summary judgment on all of Virdi's claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. Id. On remand, the district court granted the Defendants' motion for partial summary judgment on the facial challenge, and then granted the Defendants' motion for a judgment as a matter of law on the remaining claims at the close of Virdi's case. Id.

In 1989, the Board appointed the Tillman Committee (the "Committee") to study participation of female and minority owned businesses with the District. Id. The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. Id. Based upon a "general feeling" that minorities were under-represented, the Committee issued the Tillman Report (the "Report") stating "the Committee's impression that '[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community.'" Id. The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. Id.

In 1991, the Board adopted the Report and implemented several of the recommendations including advertising in the AJC, conducting seminars, and publishing the "how to" booklet. Id. The Board also implemented the Minority Vendor Involvement Program (the "MVP") which adopted the participation goals set forth in the Report. Id. at 265.

Virdi sent letters to the District expressing interest in obtaining architectural contracts. Id. In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. Id. In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but because the "District was only looking for 'black owned firms.'" Id.

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the Defendants intentionally discriminated against Virdi on the basis of his race. The Court held that strict scrutiny applies to all racial classifications, and is not limited to merely set-asides or mandatory

quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. Id. at 267. The Court first questioned whether the identified government interest was compelling. Id. at 268. However, the Court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. Id.

The Court held the MVP was not narrowly tailored for two reasons. Id. First, because no evidence existed that the District considered race-neutral alternatives to "avoid unwitting discrimination." The Court found that "[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake." Id., citing Grutter v. Bollinger, 539 U.S. 306, 339 (2003), and Richmond v. J.A. Croson Co., 488 U.S. 469, 509-10 (1989). The Court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority owned business as compared to non-minority owned businesses. Id. at 268 & n. 8. Accordingly, the Court held the MVP was not narrowly tailored. Id. at 268.

Second, the Court held that the unlimited duration of the MVP's racial goals negated a finding of narrow tailoring. Id. "[R]ace conscious . . . policies must be limited in time." Id., citing Grutter, 539 U.S. at 342, and Walker v. City of Mequite, TX, 169 F.3d 973, 982 (5th Cir. 1999). The Court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. Id. at 268.

With respect to Viridi's claims of intentional discrimination, the Court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Viridi to lose a contract that he would have otherwise received. Id. Thus, because Viridi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the Court affirmed the district court's grant of the J.M.O.L. on that issue. Id. at 269. Similarly, the Court found that Viridi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. Id.

The Court Reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and Affirmed the district court's order granting Defendants' J.M.O.L. on the issue of intentional discrimination against Viridi. Id. at 270.

**Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003), cert. denied, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari)**

This case is instructive to ITD and the disparity study because it is one of the only recent decisions to uphold the validity of a local government M/WBE-type program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an M/FBE type program.

In Concrete Works the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In Concrete Works, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.

**Case History.** Plaintiff, Concrete Works of Colorado, Inc. ("CWC") challenged the constitutionality of an "affirmative action" ordinance enacted by the City and County of Denver (hereinafter the "City" or "Denver"). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. Id.

The City enacted an Ordinance No. 513 ("1990 Ordinance") containing annual goals for M/WBE utilization on all competitively bid projects. Id. at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using "good faith efforts." Id. In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the "1996 Ordinance"). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for W/MBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority owned contractors in failing to perform the affirmative action commitments made on City projects. Id. at 956-57.

The 1996 Ordinance was amended in 1998 by Ordinance No. 948 (the "1998 Ordinance"). The 1998 Ordinance reduced annual percentage goals and prohibited an MBE or a WBE, acting as a bidder, from counting self-performed work toward project goals. Id. at 957.

CWC filed suit challenging the constitutionality of the 1990 Ordinance. Id. The district court conducted a bench trial on the constitutionality of the three ordinances. Id. The district court ruled in favor of CWC and concluded that the ordinances violated the Fourteenth Amendment. Id. The City then appealed to the Tenth Circuit Court of Appeals. Id. The Court of Appeals reversed and remanded. Id. at 954.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. Id. at 957-58, 959. The Court of Appeals also cited Richmond v. J.A. Croson Co., for the proposition that a governmental entity "can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment." 488 U.S. 469, 492, (1989) (plurality opinion). Because "an effort to alleviate the effects of *societal* discrimination is not a compelling interest," the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination "with some specificity," and (2) demonstrated that a "strong basis in evidence"

supports its conclusion that remedial action is necessary. Id. at 958 (quoting Shaw v. Hunt, 517 U.S. 899, 909-10 (1996)).

The Court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. Id. Rather, Denver could rely on "empirical evidence that demonstrates 'a significant statistical disparity between the number of qualified minority contractors . . . and the number of such contractors actually engaged by the locality or the locality's prime contractors.'" Id. (quoting Crosby, 488 U.S. at 509 (plurality opinion)). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. Id.

The Court of Appeals held that Denver could establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Id. The Court of Appeals held that once Denver met its burden, CWC had to introduce "credible, particularized evidence to rebut [Denver's] initial showing of the existence of a compelling interest, which could consist of a neutral explanation for the statistical disparities." Id. (internal citations and quotations omitted). The Court of Appeals held that CWC could also rebut Denver's statistical evidence "by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data." Id. (internal citations and quotations omitted). The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. Id. at 960.

The Court of Appeals held that to meet its burden of demonstrating an important governmental interest per the intermediate scrutiny analysis, Denver must show that the gender-based measures in the ordinances were based on "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions." Id. (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 726 (1982)).

**The Studies.** Denver presented historical, statistical and anecdotal evidence in support of its M/WBE programs. Denver commissioned a number of studies to assess its M/WBE programs. Id. at 962. The consulting firm hired by Denver utilized disparity indices in part. Id. at 962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. Id. at 963.

The consulting firm also interviewed representatives of MBEs, WBEs, majority-owned construction firms, and government officials. Id. Based on this information, the 1990 Study concluded that, despite Denver's efforts to increase MBE and WBE participation in DPW projects, some Denver employees and private contractors engaged in conduct designed to circumvent the goals program. Id. After reviewing the statistical and anecdotal evidence contained in the 1990 Study, the City Council enacted the 1990 Ordinance. Id.

After the Tenth Circuit decided Concrete Works II, Denver commissioned another study (the "1995 Study"). Id. at 963. Using 1987 Census Bureau data, the 1995 Study again examined utilization of MBEs and WBEs in the construction and professional design industries within the Denver MSA. Id. The 1995 Study concluded that MBEs and WBEs were more likely to be one-person or family-run

businesses. The Study concluded that Hispanic-owned firms were less likely to have paid employees than White-owned firms but that Asian/Native American-owned firms were more likely to have paid employees than White or other minority-owned firms. To determine whether these factors explained overall market disparities, the 1995 Study used the census data to calculate disparity indices for all firms in the Denver MSA construction industry and separately calculated disparity indices for firms with paid employees and firms with no paid employees. Id. at 964.

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic, Asian, Native American, and women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for Blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables but reported that Blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were Whites of comparable education and experience. Id.

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. Id. at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 0.64 for MBEs and 0.70 for WBEs in the construction industry. In the professional design industry, disparity indices were 0.67 for MBEs and 0.69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 census data because the data obtained from the telephone survey was more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. Id.

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, *inter alia*, whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the "1997 Study"). Id. at 966. The 1997 Study used geographic and specialization information to calculate M/WBE availability. Availability was defined as "the ratio of M/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City's contracts." Id.

The 1997 Study compared M/WBE availability and utilization in the Colorado construction industry. Id. The statewide market was used because necessary information was unavailable for the Denver MSA. Id. at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 0.41 for African American firms, 0.40 for Hispanic firms, 0.14 for Asian and other minorities, and 0.74 for women-owned firms. Id.

The 1997 Study also contained an analysis of whether African Americans, Hispanics, or Asian Americans working in the construction industry are less likely to be self-employed than similarly

situated Whites. Id. Using data from the Public Use Microdata Samples ("PUMS") of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry have lower self-employment rates than Whites. Asian Americans had higher self-employment rates than Whites.

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of M/WBEs in the Denver MSA with the potential availability of M/WBEs if they formed businesses at the same rate as Whites with the same characteristics. Id. Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. Id. at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. Id.

The 1997 Study also conducted a mail survey of both M/WBEs and non-M/WBEs to obtain anecdotal evidence on their experiences in the construction industry. Of the M/WBEs who responded, 35% indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: "How often do prime contractors who use your firm as a subcontractor on public sector projects with [M/WBE] goals or requirements ... also use your firm on public sector or private sector projects without [M/WBE] goals or requirements?" Fifty-eight percent of minorities and 41% of white women who responded to this question indicated they were "seldom or never" used on non-goals projects. Id.

M/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-M/WBEs in a separate survey. With one exception, M/WBEs considered each aspect of procurement more problematic than non-M/WBEs. To determine whether a firm's size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, M/WBEs had more difficulties than non-M/WBEs with the same characteristics. Id. at 968-69.

After the 1997 Study was completed, the City enacted the 1998 Ordinance. The 1998 Ordinance reduced the annual goals to 10% for both MBEs and WBEs and eliminated a provision which previously allowed M/WBEs to count their own work toward project goals. Id. at 969.

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. Id. He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he

believed, based on his personal experiences, that many majority-owned firms refused to hire minority or women-owned subcontractors because they believed those firms were not competent. Id.

Several M/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects but their applications were denied even though they met the prequalification requirements. Id.

Other M/WBEs testified that their bids were rejected even when they were the lowest bidder; that they believed they were paid more slowly than majority-owned firms on both City projects and private sector projects; that they were charged more for supplies and materials; that they were required to do additional work not part of the subcontracting arrangement; and that they found it difficult to join unions and trade associations. Id. There was testimony detailing the difficulties M/WBEs experienced in obtaining lines of credit. One WBE testified that she was given a false explanation of why her loan was declined; another testified that the lending institution required the co-signature of her husband even though her husband, who also owned a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. Id.

The Court also pointed out anecdotal testimony involved recitations of racially and gender-motivated harassment experienced by M/WBEs at work sites. There was testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of eighty feet. Id. at 969-70.

**The Legal Framework Applied By The Court.** The Court held that the district court incorrectly believed Denver was required to *prove* the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver's evidence showed that there *is* pervasive discrimination. Id. at 970. The Court found that In Concrete Works II, it stated that "the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." Id. at 970 (quoting Concrete Works II, 36 F.3d 1513, 1522 (10th Cir. 1994)). Denver's initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that "approaching a prima facie case of a constitutional or statutory violation," *not* irrefutable or definitive proof of discrimination. Id. at 971 (quoting Croson, 488 U.S. at 500). The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver's "evidence did not support an inference of prior discrimination and thus a remedial purpose." Id. (quoting Adarand VII, 228 F.3d at 1176).

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. Id. at 971. Thus, Denver's evidence did not suffer from the problem discussed by the Court in Croson. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The

Croson majority concluded that a "city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market." Id. at 971 (quoting Croson, 488 U.S. at 503). Thus, the Court held Denver's burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. Id.

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. Id. (citing Croson, 488 U.S. at 503). Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. Id. at 972.

The Court found Denver's statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The Court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver's evidence on that basis. Id.

The Court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. Id. at 973. The Court rejected the district court's erroneous legal conclusion that a municipality may only remedy its own discrimination. The Court stated this conclusion is contrary to the holdings in Concrete Works II and the plurality opinion in Croson. Id. The Court held it previously recognized in this case that "a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area." Id. (quoting Concrete Works II, 36 F.3d at 1529 (emphasis added)). In Concrete Works II, the Court stated that "we do not read Croson as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination." Id. (quoting Concrete Works II, 36 F.3d at 1529).

The Court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. Id. at 973. Thus, Denver was not required to demonstrate that it is "guilty of prohibited discrimination" to meet its initial burden. Id.

Additionally, the Court had previously concluded that Denver's statistical studies which compare utilization of M/WBEs to availability, support the inference that "local prime contractors" are engaged in racial and gender discrimination. Id. at 974 (quoting Concrete Works II, 36 F.3d at 1529). Thus, the Court held Denver's disparity studies should not have been discounted because they fail to specifically identify those individuals or firms responsible for the discrimination. Id.

#### **Court's Rejection of CWC's Arguments and The District Court Findings**

**Use of Marketplace Data.** The Court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City

itself. Id. at 974. The district court's conclusion, however, the Court found is directly contrary to holding in Adarand VII that evidence of both public and private discrimination in the construction industry is relevant. Id. (citing Adarand VII, 228 F.3d at 1166-67).

The Court held the conclusion reached by the majority in Croson that marketplace data is relevant in equal protection challenges to affirmative action programs is consistent with the approach later taken by the Court in Shaw v. Hunt. Id. at 975. In Shaw, a majority of the Court relied on the majority opinion in Croson for the broad proposition that a governmental entity's "interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." Id. (quoting Shaw, 517 U.S. at 909). The Shaw Court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The Court, however, did set out two conditions which must be met for the governmental entity to show a compelling interest. "First, the discrimination must be identified discrimination." Id. at 976 (quoting Shaw, 517 U.S. at 910). The City can satisfy this condition by identifying the discrimination, " 'public or private, with some specificity.' " Id. at 976 (citing Shaw, 517 U.S. at 910, quoting Croson, 488 U.S. at 504 (emphasis added)). The governmental entity must also have a "strong basis in evidence to conclude that remedial action was necessary." Id. Thus, the Court concluded Shaw specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality's burden of producing strong evidence. Id. at 976.

In Adarand VII, the Court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. Id. (citing Adarand VII, 228 F.3d at 1166-67 ("[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*" (emphasis added)). Further, the Court pointed out in this case it earlier rejected the argument CWC reasserts here that marketplace data is irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to "the Denver MSA evidence of industry-wide discrimination." Id. (quoting Concrete Works II, 36 F.3d at 1529). The Court stated that evidence explaining "the Denver government's role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA* " was relevant to Denver's burden of producing strong evidence. Id. (quoting Concrete Works II, 36 F.3d at 1530 (emphasis added)).

Consistent with the Court's mandate in Concrete Works II, the City attempted to show at trial that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business." Id. The City can demonstrate that it is a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. Id. (quoting Croson, 488 U.S. at 492).

The Court rejected CWC's argument that the lending discrimination studies and business formation studies presented by Denver are irrelevant. In Adarand VII, the Court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition

between M/WBEs and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination." Id. at 977 (quoting Adarand VII, 228 F.3d at 1167-68). The Court found evidence that private discrimination results in barriers to business formation is relevant because it demonstrates that M/WBEs are precluded *at the outset* from competing for public construction contracts. The Court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* M/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of M/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City's showing that it indirectly participates in industry discrimination. Id. at 977.

The City presented evidence of lending discrimination to support its position that M/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that "despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial." Id. at 977-78. In Adarand VII, the Court concluded that this study, among other evidence, "strongly support[ed] an initial showing of discrimination in lending." Id. at 978 (quoting, Adarand VII, 228 F.3d at 1170 and 1170 n. 13 ("Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination ... supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded.")). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The Court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The Court concluded, that discriminatory motive can be inferred from the results shown in disparity studies. The Court held the district court's criticism did not undermine the study's reliability as an indicator that the City is passively participating in marketplace discrimination. The Court noted that, in Adarand VII it took "judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects." Id. at 978 (quoting Adarand VII, 228 F.3d at 1170).

Denver also introduced evidence of discriminatory barriers to competition faced by M/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra*, the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated Whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the

exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. Id. at 978.

The Court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in Adarand VII. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion." Id. at 979 (quoting Adarand VII, 228 F.3d at 1174).

In sum, the Court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. Id. at 979-80.

**Variables.** CWC challenged Denver's disparity studies as unreliable because the disparities shown in the studies may be attributable to firm size and experience rather than discrimination. Denver countered, however, that a firm's size has little effect on its qualifications or its ability to provide construction services and that M/WBEs, like all construction firms, can perform most services either by hiring additional employees or by employing subcontractors. CWC responded that elasticity itself is relative to size and experience; M/WBEs are less capable of expanding because they are smaller and less experienced. Id. at 980.

The Court concluded that even if it assumed that M/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver's argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and that M/WBE construction firms are generally smaller and less experienced *because* of industry discrimination. Id. at 981. The lending discrimination and business formation studies, according to the Court, both strongly supported Denver's argument that M/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver's expert testified that discrimination by banks or bonding companies would reduce a firm's revenue and the number of employees it could hire. Id.

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction M/WBEs and concluded that the resulting disparities, "suggest[ ] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of non-minority male owned firms." Id. at 982. Similarly, the 1995 Study controlled for size, calculating, *inter alia*, disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the Court concluded that the district court did not give sufficient weight to Denver's disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The Court held that Denver is permitted to make assumptions about capacity and qualification of M/WBEs to perform construction services if it can support those assumptions. The Court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City's position that a

firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of M/WBEs are, themselves, the result of industry discrimination. Further, the Court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver's studies would decrease or disappear if the studies controlled for size and experience to CWC's satisfaction. Consequently, the Court held CWC's rebuttal evidence was insufficient to meet its burden of discrediting Denver's disparity studies on the issue of size and experience. Id. at 982.

**Specialization.** The district court also faulted Denver's disparity studies because they did not control for firm specialization. The Court noted the district court's criticism would be appropriate only if there was evidence that M/WBEs are more likely to specialize in certain construction fields. Id. at 982.

The Court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by M/WBEs. The Court found relevant the testimony of the City's expert, that the data he reviewed showed that MBEs were represented "widely across the different [construction] specializations." Id. at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver's studies. Id. at 983.

The Court held that CWC failed to demonstrate that the disparities shown in Denver's studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty still showed disparities, provided support for Denver's argument that firm specialization does not explain the disparities. Id. at 983.

The Court pointed out that disparity studies must make assumptions about availability as long as the same assumptions can be made for all firms. Id. at 983.

**Utilization of M/WBEs on City Projects.** CWC argued that Denver could not demonstrate a compelling interest because it overutilizes M/WBEs on City construction projects. This argument, according to the Court, was an extension of CWC's argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the Court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC's argument relating to the utilization of M/WBEs on City projects goes only to the weight of Denver's evidence. Id. at 984.

Consistent with the Court's mandate in Concrete Works II, at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program was tainted by the program and "reflect[ed] the intended remedial effect on MBE and WBE utilization." Id. at 984 (quoting Concrete Works II, 36 F.3d at 1526). Denver argued that the non-goals data was the better indicator of past discrimination in public contracting than the data on all City construction projects. Id. at 984-85. The Court concluded that Denver presented ample evidence to support the conclusion that the evidence showing M/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. Id. at 985.

The Court rejected CWC's argument that the marketplace data was irrelevant but agreed that the non-goals data is also relevant to Denver's burden. The Court noted that Denver did not rely heavily

on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. Id. at 985.

In sum, the Court held Denver demonstrated that the utilization of M/WBEs on City projects has been affected by the affirmative action programs that have been in place in one form or another since 1977. Thus, the non-goals data is the better indicator of discrimination in public contracting. The Court concluded that, on balance, the non-goals data provided some support for Denver's position that its belief that racial and gender discrimination existed in public contracting before the enactment of the ordinances was supported by strong evidence. Id. at 987-88.

**Anecdotal Evidence.** The anecdotal evidence, according to the Court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. Id. at 989. The Court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining credit and that treatment the witnesses characterized as discriminatory is experienced by all contractors, Denver's witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The Court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. Id.

The Court held there is no merit to CWC's argument that the witnesses' accounts must be verified to provide support for Denver's burden. The Court stated that anecdotal evidence is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions. Id.

After considering Denver's anecdotal evidence, the district court found that the evidence "shows that race, ethnicity and gender affect the construction industry and those who work in it" and that the egregious mistreatment of minority and women employees "had direct financial consequences" on construction firms. Id. at 989 (quoting Concrete Works III, 86 F. Supp. 2d at 1074, 1073). Based on the district court's findings regarding Denver's anecdotal evidence and its review of the record, the Court concluded that the anecdotal evidence provides persuasive, un rebutted support for Denver's initial burden. Id. at 989-90 (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it "brought the cold [statistics] convincingly to life")).

**Summary.** The Court held the record contained extensive evidence supporting Denver's position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. Id. at 990. The information available to Denver and upon which the ordinances were predicated, according to the Court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

To rebut Denver's evidence, the Court stated CWC was required to "establish that Denver's evidence did not constitute strong evidence of such discrimination." Id. at 991 (quoting Concrete Works II, 36 F.3d at 1523). CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver's evidence. Rather, it must present "credible, particularized evidence." Id. (quoting Adarand VII, 228 F.3d at 1175). The Court held that CWC did not meet its burden.

CWC *hypothesized* that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the Court found it did not conduct its own marketplace disparity study controlling for the disputed variables and presented no other evidence from which the Court could conclude that such variables explain the disparities. Id. at 991-92.

### **Narrow Tailoring**

Having concluded that Denver demonstrated a compelling interest in the race-based measures and an important governmental interest in the gender-based measures, the Court held it must examine whether the ordinances were narrowly tailored to serve the compelling interest and are substantially related to the achievement of the important governmental interest. Id. at 992.

The Court stated it had previously concluded in its earlier decisions that Denver's program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in Concrete Works II. The Court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the Court found Concrete Works did not challenge the district court's conclusion with respect to the second prong of Croson's strict scrutiny standard – i.e. that the Ordinance is narrowly tailored to remedy past and present discrimination – the Court held it need not address this issue. Id. at 992 (citing Concrete Works II, 36 F.3d at 1531 & n. 24).

The Court concluded that the district court lacked authority to address the narrow tailoring issue on remand because none of the exceptions to the law of the case doctrine are applicable. The district court's earlier determination that Denver's affirmative-action measures were narrowly tailored is law of the case and binding on the parties.

### **In Re City of Memphis, West Tennessee Chapter of Associated Builders and Contractors, Zellner Construction Company, Inc. v. City of Memphis, 293 F. 3d 345 (6th Cir. 2002)**

This case is instructive to the ITD and the disparity study in particular based on its holding that a local government may be prohibited from utilizing post-enactment evidence in support of a M/FBE type program. The United States Court of Appeals for Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MWBE Program. The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in advance of its passage. The district court had ruled that the could not introduce the post-enactment study as evidence of a compelling interest to justify its MWBE Program. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue.

### **Builder's Ass'n of Greater Chicago v. County of Cook, Chicago, 256 F.3d 642 (7th Cir. 2001)**

This case is instructive to the ITD and the disparity study because of its analysis of the Cook County M/FBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against M/FBEs and to be narrowly tailored to remedy only that identified discrimination.

In Builder's Ass'n of Greater Chicago v. County of Cook, Chicago, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MWBE Program was unconstitutional. The Court concluded there was insufficient evidence of a compelling interest. The Court held there was no credible evidence that Cook County in the award of construction contracts discriminated against any of the groups "favored" by the Program. The Court also found that the Program was not "narrowly tailored" to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The Court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

**Associated Gen. Contractors v. Drabik, 214 F.3d 730 (6th Cir. 2000),  
aff'g Case No. C2-98-943, 1998 WL 812241 (S.D. Ohio 1998)**

This case is instructive to ITD and the disparity study based on the analysis applied in finding the evidence insufficient to justify a M/FBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a "set-aside" contract based on the State of Ohio's MBE program with the award of construction contracts. The Court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The Court found that the economic data was insufficient and too outdated. The Court held the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The Court held, among other things, the statute failed the narrow tailoring test because there was no evidence that the State had considered race-neutral remedies.

The Court was mindful of the fact that it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was "not reconcilable" with the Ohio Supreme Court's decision in Ritchie Produce, 707 N.E.2d 871 (Ohio 1999) (upholding the Ohio State MBE Program).

**Associated Gen. Contractors v. Drabik, 50 F. Supp. 2d 741 (S.D. Ohio 1999)**

In this decision, the district court reaffirmed its earlier holding that the State of Ohio's MBE program of construction contract awards is unconstitutional. The court cited to F. Buddie Contracting v. Cuyahoga Community College, 31 F. Supp. 2d 571 (N.D. Ohio 1998), holding a similar local Ohio program unconstitutional. The court repudiated the Ohio Supreme Court's holding in Ritchie Produce, 707 N.E. 2d 871 (Ohio 1999), which held that the State's MBE program as applied to the state's purchase of non-construction-related goods and services was constitutional. The Court found the evidence to be insufficient to justify the MBE program. The Court held that the program was not narrowly tailored because there was no evidence that the State had considered a race-neutral alternative.

This opinion underscored that governments must show four things to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The Court held the Ohio MBE program failed to satisfy this test.

**W.H. Scott Constr. Co. v. City of Jackson, 199 F.3d 206 (5th Cir. 1999)**

This case is instructive to ITD and the disparity study because the decision highlights the evidentiary burden imposed by the courts necessary to support a local M/WBE program. Second, the Fifth Circuit permitted the aggrieved contractor to recover lost profits from the City of Jackson, Mississippi due to the City's enforcement of the M/WBE program that the court held was unconstitutional.

The Fifth Circuit, applying strict scrutiny, held that the City of Jackson, Mississippi failed to establish a compelling governmental interest to justify its policy placing 15% minority participation goals for City construction contracts. In addition, the Court held the evidence upon which the City relied was faulty for several reasons, including because it was restricted to the letting of prime contracts by the City under the City's Program, and it did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool in the City's construction projects. Significantly, the Court also held that the plaintiff in this case could recover lost profits against the City as damages as a result of being denied a bid award based on the application of the MWBE program.

**Eng'g Contractors Ass'n of S. Florida v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997)**

Engineering Contractors Association of South Florida v. Metro Dade County is a paramount case in the Eleventh Circuit and is instructive to ITD and the disparity study.

In Dade County, six trade organizations (the "Plaintiffs") filed suit in the District Court for the Southern District of Florida, challenging three affirmative action programs administered by Dade County, Florida, (the "County") as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11th Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program ("BBE"), the Hispanic Business Enterprise program ("HBE"), and the Woman Business Enterprise program, ("WBE"), (collectively "MWBE" programs). Id. The Plaintiffs challenged the application of the program to County construction contracts. Id.

For certain classes of construction contracts valued over \$25,000, the County set participation goals of 15% for BBEs, 19% for HBEs, and 11% for WBEs. Id. at 901. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. Id. The County Commission would make the final determination and its decision was appealable to the County Manager. Id. The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. Id.

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite "strong basis in evidence" to support the race- and ethnicity-conscious measures. Id. at 902. The district court applied intermediate scrutiny to the WBE program and found that the "County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference." Id. Therefore, the County had failed to demonstrate a "compelling interest" necessary to support the BBE and HBE programs, and failed to demonstrate an "important interest" necessary to support the WBE program. Id. The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE

programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. Id. The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals AFFIRMED. Id. at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

- Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary].
- Whether the district court erred in finding the County lacked a "strong basis in evidence" to justify the existence of the BBE and HBE programs.
- Whether the district court erred in finding the County lacked a "sufficient probative basis in evidence" to justify the existence of the WBE program.
- Whether the MWBE programs were narrowly tailored to the interests they were purported to serve.

Id. at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). Id. at 906. Under this standard, "an affirmative action program must be based upon a 'compelling government interest' and must be 'narrowly tailored' to achieve that interest." Id. The Eleventh Circuit further noted:

In practice, the interest that is alleged in support of racial preferences is almost always the same – remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest.

Id. (internal citations omitted).

Therefore, strict scrutiny requires a finding of a "'strong basis in evidence' to support the conclusion that remedial action is necessary." Id., citing Croson, 488 U.S. at 500. The requisite "'strong basis in evidence' *cannot* rest on 'an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.'" Id. at 907, citing Ensley Branch, NAACPv. Seibels, 31 F.3d 1548, 1565 (11th Cir. 1994) (citing and applying Croson). However, the Eleventh Circuit found that a governmental entity can "justify affirmative action by demonstrating 'gross statistical disparities' between the proportion of minorities hired . . . and the proportion of minorities willing and able to do the work. . . . Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence." Id. (internal citations omitted).

Notwithstanding the "exceedingly persuasive justification" language utilized by the Supreme Court in United States v. Virginia, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. Id. at 908. Under this standard, the government must provide "sufficient probative evidence" of discrimination, which is a lesser standard than the "strong basis in evidence" under strict scrutiny. Id. at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical "anecdotal" evidence. Id. at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially "post-enactment" evidence (i.e. evidence based on data related to years following the initial enactment of the BBE program). Id. However, "such evidence carries with it the hazard that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market." Id. at 912. A district court should not "speculate about what the data *might* have shown had the BBE program never been enacted." Id.

**The Statistical Evidence.** The County presented five (5) basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. Id. In summary, the Eleventh Circuit held that the County's statistical evidence (described more fully below) was subject to more than one interpretation. Id. at 924. The district court found that the evidence was "insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the County's stated rationale for imposing a gender preference." Id. The district court's view of the evidence was a permissible one. Id.

**County Contracting Statistics:** The County presented a study comparing three (3) factors for County non-procurement construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. Id. at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no "consistently negative disparities between the bidder and awardee percentages. Id. at 913. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate 'share' . . . when the bidder percentages are used as the baseline." Id. For the WBE statistics, the bidder / awardee statistics were "decidedly mixed" as across the range of County construction contracts. Id.

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MWBEs, by calculating "disparity indices" for each program and classification of construction contract. The Eleventh Circuit explained:

[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group's bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group's contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100%.

Id. at 914. "The utility of disparity indices or similar measures . . . has been recognized by a number of federal circuit courts." Id.

The Eleventh Circuit found that "[i]n general, . . . disparity indices of 80% or greater, which are close to full participation, are not considered indications of discrimination." Id. The Eleventh Circuit noted that "the EEOC's disparate impact guidelines use the 80% test as the boundary line for determining a prima facie case of discrimination." Id., citing 29 C.F.R. § 1607.4D. In addition, no circuit that has "explicitly endorsed the use of disparity indices [has] indicated that an index of 80% or greater might be probative of discrimination." Id., citing Concrete Works v. City & County of Denver, 36 F.3d 1513, 1524 (10th Cir. 1994) (crediting disparity indices ranging from 0% to 3.8%); Contractors Ass'n v. City of Philadelphia, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. Id. at 914. "The standard deviation figure describes the probability that the measured disparity is the result of mere chance." The Eleventh Circuit had previously recognized "[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance." Id.

The statistics presented by the County indicated "statistically significant underutilization of BBEs in County construction contracting." Id. at 916. The results were "less dramatic" for HBEs and mixed as between favorable and unfavorable for WBEs. Id.

The Eleventh Circuit then explained the burden of proof:

[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant's] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored.'

Id. (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three (3) methods to rebut the inference of discrimination with a "neutral explanation" by: "(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data." Id. (internal quotations and citations omitted). The Eleventh Circuit held that the Plaintiffs produced "sufficient evidence to establish a neutral explanation for the disparities." Id.

The Plaintiffs alleged that the disparities were "better explained by firm size than by discrimination. . . [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts." Id. at 916-17. The Plaintiffs produced Census data indicating, on

average, minority and female-owned construction firms in Dade County were smaller than non-MWBE firms. Id. at 917. The Eleventh Circuit found that the Plaintiffs explanation of the disparities was a "plausible one, in light of the uncontroverted evidence that MWBE construction firms tend to be substantially smaller than non-MWBE firms." Id.

Additionally, the Eleventh Circuit noted that the County's own expert admitted that "firm size plays a significant role in determining which firms win contracts." Id. The expert stated:

The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it.

Id. The Eleventh Circuit then summarized:

Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms.

Id.

In an anticipation of such an argument, the County conducted a regression analysis to control for firm size. Id. A regression analysis is "a statistical procedure for determining the relationship between a dependent and independent variable, e.g., the dollar value of a contract award and firm size." Id. (internal citations omitted). The purpose of the regression analysis is "to determine whether the relationship between the two variables is statistically meaningful." Id.

The County's regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. Id. The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. Id. The regression analyses accounted for most of the negative disparities regarding MWBE participation in County construction contracts (i.e. most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). Id.

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. Id. at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite "strong basis in evidence" of discrimination of BBEs and HBEs. Id. The Eleventh Circuit held that this decision was not clearly erroneous. Id.

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. Id. The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. Id.

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods failed to explain the unfavorable disparity for another type of contract during that same time period. Id. However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. Id. The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. Id.

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract in the 1993 period. Id. The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. Id. The Eleventh Circuit held the district court permissibly found that this evidence was not "sufficiently probative of discrimination." Id.

The County argued that the district court erroneously relied on the disaggregated data (i.e. broken down by contract type) as opposed to the consolidated statistics. Id. at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) "the County's own expert testified as to the utility of examining the disaggregated data 'insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another.'" Id.

Additionally, the district court noted, and the Eleventh Circuit found that "the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as 'Simpson's Paradox,' which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated." Id. at 919 n. 4 (internal citations omitted). "Under those circumstances," the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a "strong basis in evidence" of discrimination, or in finding that the disaggregated data formed an insufficient basis of support for any of the MWBE programs given the applicable constitutional requirements. Id. at 919.

**County Subcontracting Statistics:** The County performed a subcontracting study to measure MWBE participation in the County's subcontracting businesses. For each MWBE category (BBE, HBE, and WBE), "the study compared the proportion of the designated group that filed a subcontractor's release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period." Id. The district court found the statistical evidence insufficient to support the use of race- and an ethnicity-conscious measures, noting problems with some of the data measures. Id. at 920.

**Marketplace Data Statistics:** The County conducted another statistical study "to see what the differences are in the marketplace and what the relationships are in the marketplace." Id. The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a "certificate of competency" with Dade County as of January 1995. Id. The selected firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm's owner, and asked for

information on the firm's total sales and receipts from all sources. Id. The County's expert then studied the data to determine "whether meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm. Id. The expert's hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. Id.

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. Id. Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. Id. at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." Id., quoting Croson, 488 U.S. at 501 (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 n. 13 (1977)).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. Id. Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed supra. Id.

**PUMS Data:** The County also introduced a statistical analysis prepared by Mr. Jon Wainwright, analyzing "the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database" (derived from the decennial census). Id. The study "(1) compared construction business ownership rates of MWBEs to those of non-MWBEs, and (2) analyzed disparities in personal income between MWBE and non-MWBE business owners." Id. "The study concluded that blacks, Hispanics, and women are less likely to own construction businesses than similarly situated white males, and MWBEs that do enter the construction business earn less money than similarly situated white males." Id.

With respect to the first conclusion, the analysis controlled for "human capital" variables (education, years of labor market experience, marital status, and English proficiency) and "financial capital" variables (interest and dividend income, and home ownership). Id. The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. Id. The disparities for blacks and women (but not Hispanics), were substantial and statistically significant. Id. at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. Id.

The Eleventh Circuit held, in light of Croson, the district court need not have accepted this theory. Id. The Eleventh Circuit quoted Croson, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: "There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic

opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction." Id., quoting Croson, 488 U.S. at 503. Following the Supreme Court in Croson, the Eleventh Circuit held "the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason." Id., quoting Croson, 488 U.S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MWBE firms as opposed to non-MWBE firms, which would further negate the proposition that the construction industry was discriminating against minority and women owned firms. Id. at 922.

With respect to the personal income component of the study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. Id. at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed supra, which did regress for firm size. Id.

**The Brimmer Study:** The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. Id. The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau's Survey of Minority and Women Owned Businesses, produced every five years. Id. The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. Id.

The study indicated substantial disparities in 1977 and 1987 but 1982. Id. The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. Id. However, the study made no attempt to filter for the Metrorail project and "complete[ly] fail[ed]" to account for firm size. Id. Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. Id. at 924.

**The Non-Statistical "Anecdotal" Evidence.** In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBes, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBEs. Id. The County presented three (3) basic forms of anecdotal evidence: "(1) the testimony of two County employees responsible for administering the MWBE programs; (2) the testimony, primarily by affidavit, of twenty-three MWBE contractors and subcontractors; and (3) a survey of black-owned construction firms." Id.

The Eleventh Circuit found that numerous black and some female owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County's construction contracting process. Id. However, such anecdotal evidence is helpful "only when it [is] combined with and reinforced by sufficiently probative statistical evidence." Id. In her plurality opinion in Croson, Justice O'Connor found that "evidence of a pattern of individual discriminatory acts can, *if supported by appropriate statistical proof*, lend support to a local government's determination that broader remedial relief is justified." Id., quoting Croson, 488 U.S. at 509 (emphasis added by the Eleventh Circuit).

Accordingly, the Eleventh Circuit held that "anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." Id. at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. Id. at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MWBE programs because they did not rest on a "constitutionally sufficient evidentiary foundation." Id.

Although the Eleventh Circuit determined that the MWBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MWBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, i.e. "remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market." Id.

**Narrow Tailoring.** "The essence of the 'narrowly tailored' inquiry is the notion that explicitly racial preferences . . . must only be a 'last resort' option." Id., quoting Hayes v. North Side Law Enforcement Officers Ass'n, 10 F.3d 207, 217 (4th Cir. 1993), and citing Croson, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he strict scrutiny standard . . . forbids the use of even narrowly drawn racial classifications except as a last resort.").

The Eleventh Circuit has identified four (4) factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) "the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties." Id. at 927, citing Ensley Branch, 31 F.3d at 1569. The four (4) factors provide "a useful analytical structure." Id. at 927. The Eleventh Circuit focused only on the first factor in the present case "because that is where the County's MWBE programs are most problematic." Id.

The Eleventh Circuit

flatly reject[ed] the County's assertion that 'given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.' That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." Id., citing Croson, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting"). . . . Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment.

Id.

The Eleventh Circuit held that the County "clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures." Id.

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. Id. at 928. Moreover, the Eleventh Circuit found that the testimony of the County's own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black and Hispanic owned construction firms. Id. The County employees identified problems, virtually all of which were related to the County's own processes and procedures, including: "the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information." Id. The Eleventh Circuit found that the problems facing MWBE contractors were "institutional barriers" to entry facing every new entrant into the construction market, and were perhaps affecting the MWBE contractors disproportionately due to the "institutional youth" of black and Hispanic owned construction firms. Id. "It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part." Id.

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O'Connor in Croson:

[T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect. . . . The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks.

Id., quoting Croson, 488 U.S. at 509-10. The Eleventh Circuit found that except for some "half-hearted programs" consisting of "limited technical and financial aid that might benefit BBEs and HBEs," the County had not "seriously considered" or tried most of the race- and ethnicity-neutral alternatives available. Id. at 928. "Most notably, . . . the County has not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the County's own contracting process." Id.

The Eleventh Circuit found that the County had taken no steps to "inform, educate, discipline, or penalize" discriminatory misconduct by its own employees. Id. at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. Id. "Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort." Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. Id.

**Substantial Relationship.** The Eleventh Circuit held that due to the relaxed "substantial relationship" standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. Id. However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. Id.

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MWBE programs unconstitutional and enjoining their continued operation.

**Contractors Ass'n of E. Pa. v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996)**

This case is instructive to the ITD and the disparity study as it shows how courts may find a program invalid regardless of whether it has a compelling interest to remedy discrimination, if the program is not narrowly tailored. In this case, after examining the statistical and anecdotal evidence, the trial court held that the City of Philadelphia had failed to show a strong basis in evidence and therefore had no compelling governmental interest for its program. The trial court also determined that the ordinance was not narrowly tailored.

On appeal, the Third Circuit declined to determine whether the government had a compelling interest, and did not address the statistical or anecdotal evidence. The Court found the ordinance unconstitutional because it was not narrowly tailored. This holding was based on the Court's conclusion the ordinance had goals for subcontractor participation without any evidence of discrimination and any analysis of or evidence concerning subcontractor data.

**Florida A.G.C. Council, Inc. v. State of Florida, 303 F. Supp. 2d 1307 (N.D. FLA. 2004)**

This case is instructive in terms of the type of legislation to be considered by the ITD as to what the courts consider to be a "race-conscious" program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The Plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The Plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious "preferences" in order to increase the numeric representation of minority business enterprises ("MBEs") in certain industries.

According to the Court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity ("OSD") to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute's purpose. The statute provided that each State agency is "encouraged" to spend 21% of the monies actually expended for construction contracts, 25% of the monies actually expended for architectural and engineering contracts, 24% of the monies actually expended for commodities and 50.5% of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain percentages for black Americans, Hispanic-Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were “precatory.” The Court found that the Plaintiffs had standing to maintain the action and to pursue prospective relief. The Court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The Court did not specifically address whether the articulated reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, “if true,” constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the Court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The Court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 *et seq.*, such as “simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.” Florida A.G.C. Council, 303 F. Supp. 2d 1307, 1315 (N.D. Fla. 2004), quoting Eng. Contractors Ass'n of S. Florida, Inc. v. Metro. Dade County, 122 F.3d 895, 928 (11th Cir. 1997) (quoting Croson, 488 U.S. at 509-10).

The Court noted that Defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is “permissive.” The Court, however, held that “there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute ‘induces an employer to hire with an eye toward meeting . . . [a] numerical target.’” Florida A.G.C. Council, 303 F. Supp. 2d at 1316.

The Court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the Court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting a MBE utilization plan. If the State agency deviated from the Utilization Plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all solicitations and contract awards of the agency as deemed necessary until such time as the agency met its utilization plan. The Court held that based on these factors, although alleged to be “permissive,” the statute textually was not.

Therefore, the Court found that the statute was not narrowly tailored to serve a compelling governmental interest, and consequently violated the Equal Protection Clause of the Fourteenth Amendment.

**Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County,  
333 F. Supp. 2d 1305 (S.D. Fla. 2004)**

The recent decision in Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County applied and followed the Dade County decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus Hershell Gill is instructive as to the analysis relating to architect and engineering services. The decision in Hershell Gill also involved imposing compensatory and punitive damages upon individual County Commissioners due to the district court's finding of their willful failure to abrogate an unconstitutional M/FBE Program. In addition, the case is noteworthy because the

district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003). See discussion, infra.

Six years after the decision in Eng'g Contractors Ass'n v. Metropolitan Dade County, two white male owned engineering firms (the "Plaintiffs") brought suit against Dade County (the "County"), the former County Manager, and various current County Commissioners (the "Commissioners") in their official and personal capacities (collectively the "Defendants"), seeking to enjoin the same "participation goals" in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit's decision in Dade County striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise (CSBE) program for construction contracts, "but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services." Id. at 1311.

The Plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively "MWBE"). Id. The MWBE programs applied to A&E contracts in excess of \$25,000. Id. at 1312. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Id. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. Id. The County was required to review the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. Id. at 1313. However, the District Court found "the participation goals for the three MWBE programs challenged . . . remained unchanged since 1994." Id.

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A & E contracts. Id. at 1314. Upon request of the Commissioners, the County manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A & E for blacks, Hispanics, and women, and concluded both times that the "County has reached parity for Black, Hispanic, and Women-owned firms in the areas of [A & E] services." The final report further stated "Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures." Id. at 1315. The district court also found that the Commissioners were informed that "there was even less evidence to support [the MWBE] programs as applied to architects and engineers than there was in contract construction." Id. Nonetheless, the Commissioners voted to continue the MWBE participation goals at their previous levels. Id.

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the County. His final report had four (4) parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics – but not against blacks – in the fields of architecture and engineering.

Id.

The district court issued a preliminary injunction enjoining the use of the MWBE programs for A & E contracts, pending the United States Supreme Court decisions in Gratz v. Bollinger, 539 U.S. 244 (2003), and Grutter v. Bollinger, 539 U.S. 306 (2003). Id. at 1316.

The court considered whether the MWBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in Gratz and Grutter did not alter the constitutional analysis as set forth in Adarand and Croson. Id. at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present "a strong basis of evidence" indicating the MWBE program was necessary and that it was narrowly tailored to its purported purpose. Id. at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the "gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective." Id. at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present "sufficient probative evidence" of discrimination. Id. (internal citations omitted). The court found importantly, that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) the gender-conscious affirmative action program need not be used only as a "last resort." Id.

The County presented both statistical and anecdotal evidence. Id. at 1318.

The statistical evidence consisted of Dr. Carvajal's report, most of which consisted of "post-enactment" evidence. Id. Dr. Carvajal's analysis sought to discover the existence of racial, ethnic and gender disparities in A & E, and then to determine whether any such disparities could be attributed to discrimination. Id. The study used four (4) data sets: three (3) were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. Id. Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County's Department of Public Works to compile a list of the "universe" of firms competing in the market.

Id. For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. Id.

Dr. Carvajal then conducted a phone survey of the identified firms.

Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A & E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. Id. Dr. Carvajal conducted regression analyses "in order to determine the effect a firm owner's gender or race had on certain dependent variables." Id. Dr. Carvajal used the firm's annual volume of business as a dependent variable and determined the disparities were due in each case to the firm's gender and/or ethnic classification. Id. at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms." Id. Dr. Carvajal's results remained substantially unchanged. Id.

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the "gross statistical disparities" in the annual business volume for Hispanic and women owned firms could be attributed to discrimination; he "did not find sufficient evidence of discrimination against blacks." Id. The court held that Dr. Carvajal's study constituted neither a "strong basis in evidence" of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute "sufficient probative evidence" necessary to justify the gender-conscious measures. Id. The court made an initial finding that no disparity existed to indicate underutilization of MWBEs in the award of A & E contracts by the County, nor was there underutilization of MWBEs in the contracts they were awarded. Id. The court found that an analysis of the award data indicated, "[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace." Id.

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. Id. at 1321. With respect to the marketplace data for Hispanics and women, the court found it "unreliable and inaccurate" for three (3) reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace data survey was unreliable. Id. at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the "Tenth Circuit's decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari." Id. at 1325 (internal citations omitted).

The Defendant interveners presented anecdotal evidence pertaining only to discrimination against women in the County's A & E industry. Id. The anecdotal evidence consisted of the testimony of three A & E professional women, "nearly all" of which was related to discrimination in the award of County contracts. Id. at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal's study indicating that no disparity existed with respect to the award of County A & E contracts. Id.

The court quoted the Eleventh Circuit in Dade County for the proposition "that only in the rare case will anecdotal evidence suffice standing alone." Id. (internal citations omitted). The court held that "[t]his is not one of those rare cases." The district court concluded that the statistical evidence was "unreliable and fail[ed] to establish the existence of discrimination," and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in Dade County where the County employees themselves testified. Id.

The court made an initial finding that a number of minorities provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. Id. at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal's report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. Id. at 1330. However, the court found that because the study failed to "identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished, . . . it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone." Id.

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A & E industry, the Commissioner declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after Dade County. Id. Instead, the Commissioners voted to continue the HBE program. Id. The court held that the County's failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. Id. at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. Id. However, "not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A & E industry," leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. Id. Under either scenario, the HBE could not be narrowly tailored. Id.

The court found the waiver provisions in the HBE inflexible in practice. Id. Additionally, the court found the County had failed to comply with the provisions in the HBE requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. Id. The court found this even "more problematic" because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences "must be limited in time." Id. at 1332, citing Grutter, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. Id. at 1332.

With respect to the WBE program, the court found that "the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination." Id. at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE unable to satisfy the substantial relationship test. Id.

The court held that the County was liable for any compensatory damages. Id. at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnic-, and gender-conscious measures of the MWBE programs if their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known. . . . Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnic-, and gender-conscious measures] gave them 'fair warning' that their actions were unconstitutional. " Id. at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they "had before them at least three cases that gave them fair warning that their application of the MWBE programs . . . were unconstitutional: Croson, Adarand and [Dade County]." Id. at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both Croson and Adarand. Id. Moreover, the Eleventh had already struck down the construction provisions of the same MWBE programs. Id. Thus, the case law was "clearly established" and gave the Commissioners fair warning that the MWBE programs were unconstitutional. Id.

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MWBE programs and indicating that parity had been achieved. Id. at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MWBE ordinance itself. Id. For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A & E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs \$100 each in nominal damages, and reasonable attorneys fees and costs, for which it held the County and the Commissioners jointly and severally liable.

**The Builders Ass'n of Greater Chicago v. The City of Chicago,**  
**298 F. Supp. 2d 725 (N.D. Ill. 2003)**

This case is instructive to the ITD and the disparity study because of the court's focus and analysis on whether the City of Chicago's M/WBE program was narrowly tailored. The basis of the court's holding that the program was not narrowly tailored is instructive for any program considered by ITD because of the reasons provided as to why the program did not pass muster.

The Plaintiff, the Builders Association of Greater Chicago, brought this suit challenging the constitutionality of the City of Chicago's construction Minority and Women Owned Business ("MWBE") Program. The Court held that the City of Chicago's MWBE program was unconstitutional because it did not satisfy the requirement that it be narrowly tailored to achieve a compelling governmental interest. The Court held that it was not narrowly tailored for several reasons, including because there was no "meaningful individualized review" of MWBEs; it had no termination date nor did it have any means for determining a termination; the "graduation" revenue amount for firms to graduate out of the program was very high, \$27,500,000 and in fact very few firms graduated; there was no net worth threshold; and, waivers were rarely or never granted on

construction contracts. The Court found that the City program was a “rigid numerical quota,” a quota related not to the number of available, willing and able firms. Formulistic percentages, the Court held, could not survive the strict scrutiny.

The Court held that the goals plan did not address issues raised as to discrimination regarding market access and credit. The Court found that a goals program does not directly impact prime contractor’s selection of subcontractors on non-goals private projects. The Court found that a set-aside or goals program does not directly impact difficulties in accessing credit, and does not address discriminatory loan denials or higher interest rates.

The Court concluded that other race-neutral means were available to impact credit, high interest rates, and other potential market place discrimination. The Court pointed to race-neutral means including linked deposits, with the City banking at institutions making loans to startup and smaller firms. Other race-neutral programs referenced included quick pay and contract downsizing; restricting self-performance by prime contractors; a direct loan program; waiver of bonds on contracts under \$100,000; a bank participation loan program; a 2% local business preference; outreach programs and technical assistance and workshops; and seminars presented to new construction firms.

The Court held that race and ethnicity do matter, but that racial and ethnical classifications are highly suspect, can be used only as a last resort, and cannot be made by some mechanical formulation. Therefore, the Court concluded the City’s MWBE Program could not stand in its present guise. The Court held that the present program was not narrowly tailored to remedy past discrimination and the discrimination demonstrated to now exist.

The Court entered an injunction, but delayed the effective date for six months from the date of its order, December 29, 2003. The Court held that the City had a “compelling interest in not having its construction projects slip back to near monopoly domination by white male firms.” The Court ruled a brief continuation of the program for six months was appropriate “as the City rethinks the many tools of redress it has available.”

**Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore,**  
**218 F. Supp. 2d 749 (D. Md. 2002)**

This case is instructive to the ITD and the disparity study because the court found the Executive Order of the Mayor of the City of Baltimore was precatory and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

The Associated Utility Contractors of Maryland, Inc. (“AUC”) sued the City of Baltimore challenging its ordinance providing for minority and women owned business enterprise (“MWBE”) participation in city contracts. Previously, an earlier City of Baltimore MWBE program was declared unconstitutional. Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore, 83 F. Supp. 2d 613 (D. Md. 2000). The City adopted a new ordinance that provided for the establishment of MWBE participation goals on a contract-by-contract basis, and made several other changes from the previous MWBE program declared unconstitutional in the earlier case.

In addition, the Mayor of the City of Baltimore issued an Executive Order that announced a goal of awarding 35% of all City contracting dollars to MWBEs. The Court found this goal of 35% participation was aspirational only and the Executive Order contained no enforcement mechanism or

penalties for noncompliance. The Executive Order also specified many “noncoercive” outreach measures to be taken by the City agencies relating to increasing participation of MWBEs. These measures were found to be merely aspirational and no enforcement mechanism was provided.

The Court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The Court denied the motion to dismiss holding that the association had standing to challenge the new MWBE ordinance, although the Court noted that it had significant issues with the AUC having representational standing because of the nature of the MWBE plan and the fact the AUC did not have any of its individual members named in the suit. The Court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having standing to bring a facial challenge based on a finding that it imposes no requirement, creates no sanctions, and does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a “case or controversy” in connection with a facial attack. The Court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

After this decision the City of Baltimore and the AUC entered into a settlement agreement and a dismissal with prejudice of the case. An order was issued by the Court on October 22, 2003 dismissing the case with prejudice.

**Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, 83 F. Supp. 2d 613 (D. Md. 2000)**

The Court held unconstitutional the City of Baltimore’s “affirmative action” program, which had construction subcontracting “set-aside” goals of 20% for MBEs and 3% for WBEs. The Court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MWBE availability and utilization in the subcontracting construction market in Baltimore. The Court enjoined the City Ordinance.

**Phillips & Jordan, Inc. v. Watts, 13 F. Supp. 2d 1308 (N.D. Fla. 1998)**

This case is instructive to ITD and the disparity study because it addresses a challenge to a state and local government M/FBE type program implemented by a state department of transportation and considered the requisite evidentiary basis necessary to support the program. In Phillips & Jordan, the District Court for the Northern District of Florida held that the Florida Department of Transportation’s (“FDOT”) program of “setting aside” certain highway maintenance contracts for African-American and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts “set aside” for business enterprises owned by Hispanic and African-American individuals. The Court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The District Court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The Court stated that the essence of FDOT’s claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities “supposedly willing and able to do road maintenance work;” that FDOT did not itself engage in any racial or

ethnic discrimination; so FDOT must have been a passive participant in “somebody’s” discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the Court found that the record contained insufficient proof of discrimination. The Court found the evidence insufficient to establish acts of discrimination against African-American and Hispanic-owned businesses.

The Court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The Court expressed concern about whether it was appropriate to use census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.